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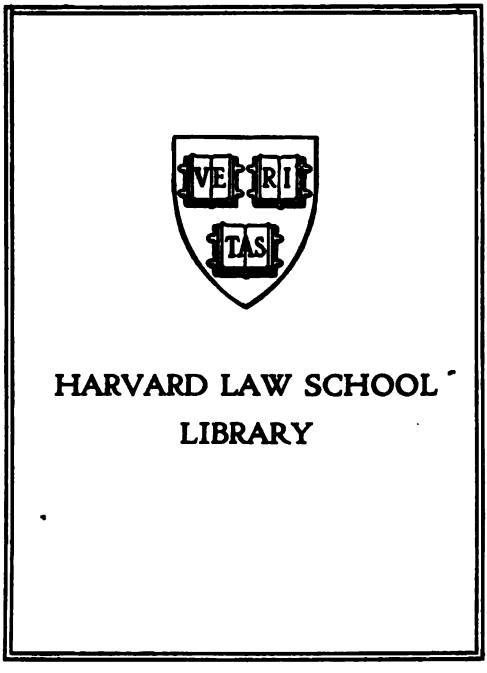

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MASSACHUSETTS REPORTS

211

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1912—MAY 1912

HENRY WALTON SWIFT

REPORTER

BOSTON
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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. JAMES MADISON MORTON.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. HENRY NEWTON SHELDON.
HON. CHARLES AMBROSE DECOURCY.

ATTORNEY GENERAL

HON. JAMES MARCUS SWIFT.

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Correction of Errors in 210 Mass.

On page 93 of 210 Mass. in the seventh line from the top of the page the word "risks" should read "writs."

On page 588 of 210 Mass. in the twenty-third line from the top of the page the word "accurate" should read "inaccurate."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

HARRIET A. PAYNE *vs.* JASON L. DEXTER.
SEABOARD TRADING COMPANY *vs.* HARRIET A. PAYNE.
EDWARD STEINBRUGGE *vs.* SEABOARD TRADING COMPANY.
BENJAMIN M. SHIPMAN *vs.* EDWARD STEINBRUGGE.

Dukes County. November 15, 1911. — January 5, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions, Auditor's report, Ordering verdict. *Evidence,* Presumptions and burden of proof. *Contract,* Validity. *Sale. Lord's Day. Estoppel.*

Four actions of replevin for the possession of the same personal property were tried together. One who was a plaintiff in the third action and a defendant in the fourth but was not a party to either of the other two, alleged exceptions in all four cases. There having been testimony at the trial that the interest of a party in the first and second actions had been transferred to the excepting party, the exceptions for that reason were treated as properly taken in all four cases, although *it was doubted,* whether otherwise there was any right of exception in the two cases in which the excepting party was neither a plaintiff nor a defendant.

At the trial together of four actions of replevin for the possession of certain personal property, there was in evidence an auditor's report finding title in the plaintiff in the first action because of a conveyance from one who, on evidence introduced as to issues in the other actions, might have been found not to have owned the property and to have had no right to convey it to the plaintiff in the first action. *Held,* that it could not have been ruled in the first action that, "no evidence having been offered to control the auditor's report, and that report being in favor of the plaintiff, the jury must find for the plaintiff."

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At the trial of an action of replevin for the possession of certain fish, an auditor's report was put in evidence finding for the defendant, and there also was evidence tending to show that in May of a certain year two persons made a partnership agreement with regard to the securing of fishing privileges in a certain locality and the catching and sale of fish, that shortly thereafter one of the partners made an agreement with the defendant, of which the other partner did not know, to manage for the defendant the business of procuring fish in the same neighborhood, and that, two days after the agreement with the defendant, the partner who was ignorant of it purchased for the partnership the fish in question, which subsequently were conveyed by him acting on behalf of the partnership to the plaintiff. *Held*, that it could not be ruled as a matter of law that the jury must find for the defendant.

In an action of replevin there was evidence tending to show that the personal property replevied formerly had belonged to a partnership, that on a Lord's day one of the partners had made an agreement as to the sale of the property to the plaintiff, that later, the agreement not being carried out, the plaintiff had attached the property in an action against the partner who had sold it to him and subsequently had procured a bill of sale of it from the other partner acting for the partnership, which he relied on to prove his title to the property in the action of replevin. *Held*, that the validity of the contract of sale made on the Lord's day was not a material issue in the case.

In an action of replevin there was evidence tending to show that the plaintiff had procured title by a bill of sale executed and delivered by one of two partners acting for the partnership, and that the partnership had the legal title to the property at the time of the delivery of the bill of sale. There also was evidence tending to show that the other partner had embezzled from the defendant, who was in no way interested in the partnership, the money used by the partnership to procure the property. There was no evidence that the partner who gave the bill of sale to the plaintiff knew of such misuse of funds by his partner. *Held*, that the misuse, in the purchasing of the property in question, of the defendant's funds by one of the partners without the knowledge of the partner who conveyed it to the plaintiff was not a material issue in the case.

If, at the trial of an action of replevin, there is evidence tending to show the existence of a partnership between two persons, one of whom, purporting to act for the partnership, conveyed to the plaintiff the personal property in question, and there also is evidence that before the conveyance to the plaintiff the other of the alleged partners in the presence of his alleged partner informed a representative of the plaintiff that the alleged partner was not his partner, the jury should not be instructed that, as matter of law, if they should find such declaration to have been made, the subsequent conveyance was of no effect.

If, at the trial of an action of replevin, there is evidence tending to show the existence of a partnership between two persons, one of whom, purporting to act for the partnership, conveyed to the plaintiff the personal property in question, and it appears that, previous to the conveyance to the plaintiff, an authorized representative of the plaintiff, knowing that the other alleged partner disclaimed the existence of the partnership, had caused the property to be seized upon attachment as the individual property of such other alleged partner in an action by the plaintiff against him, that such action never was entered in court and that no one ever put any reliance upon the attachment, the plaintiff later in the action on trial replevying the property while it was in the possession of the

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attaching officer, the jury should not be instructed that the plaintiff by the previous attachment was estopped to deny that the property belonged solely to the partner in whose name he had attached it.

An action of replevin was referred to an auditor, and the hearings for one reason and another were continued from time to time until the auditor was ordered to proceed with the hearing on a certain day irrespective of whether both parties were present. A hearing accordingly was held at which only one party was present, in whose favor the auditor reported. At the trial of the action the presiding judge instructed the jury, with regard to the report, as follows: "It is a proper fact to take into consideration, in determining what weight you should give to this report, that it was an *ex parte* hearing. The evidence was *prima facie* evidence. The report is not conclusive. It is *prima facie* evidence, and that is not conclusive evidence. The parties may introduce other evidence for the purpose of controlling the report. You are not bound by the report; you are to take all the evidence together and give it such weight as you think it may be entitled to." *Held*, that the instructions were correct.

FOUR ACTIONS OF REPLEVIN respecting the sale of thirteen hundred and two barrels of alewives. Writs dated respectively August 2, 9, 20, and 23, 1906.

The cases were referred to Arthur E. Perry, Esquire, as auditor. His report was introduced in evidence. It merely contained a finding in substance for the plaintiffs in the first and third actions and for the defendants in the second and fourth. As to Harriet A. Payne, he recited that, after one Charles L. Prescott made his contract with one Edward Steinbrugge, he (Prescott) by a bill of sale dated July 16, 1906, conveyed to Harriet A. Payne his interest in the fish. The facts regarding the report are stated in that part of the charge referring to it, which is quoted below.

In the Superior Court the cases were tried together before *Stevens*, J. It appeared that Steinbrugge, doing business under the name and style of Lyon, Dupuy and Company, on March 16, 1906, made a contract in writing with Prescott by the terms of which Steinbrugge was to buy the fishing privileges in streams at East Weymouth, Bournedale and East Wareham, and Prescott was to act as manager of the streams and in the disposal of the fish, the net proceeds of the enterprise to be divided between them. On May 25, 1906, it was agreed that the terms of the contract should be extended to include the catch of alewives at West Tisbury.

There was evidence, which was contradicted, that, just before May 25, 1906, Prescott met one Andrew N. Gifford and that they then formed a partnership under the name of A. N. Gifford and

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Company, by the terms of which Gifford was to secure the rights and arrange for the purchase of the alewives and Prescott was to furnish the money and they were to divide the profits equally. Gifford did arrange for the purchase and sale to him of the alewives which are the subject matter of these actions. Prescott sent to Gifford barrels belonging to Steinbrugge to pack fish in and also sent him money for expenses. There was evidence that such money was in whole or great part Steinbrugge's money. There was no evidence to show that Gifford knew whose money and barrels Prescott was using. On June 11, 1906, Prescott sold to the Seaboard Trading Company one thousand barrels of alewives, to be shipped from Vineyard Haven to New York, and the Seaboard Trading Company advanced money to him therefor, and also shipped barrels to Vineyard Haven in which the fish were to be packed.

On July 28, 1906, the Seaboard Trading Company, upon Prescott's failure to send the fish to New York, brought an action against Prescott and attached the thirteen hundred and two barrels of alewives, which are the subject of these actions, at Vineyard Haven as the property of Prescott. Later on the same day it procured from Gifford a bill of sale of the fish which Gifford executed under seal as follows: "Gifford & Co. By Andrew W. Gifford." The action never was entered in court. On August 2, 1906, Harriet A. Payne, claiming under an alleged bill of sale from Prescott, brought a writ of replevin against the deputy sheriff who was holding the fish under the attachment and obtained possession of them. On August 9, 1906, the Seaboard Trading Company brought a writ of replevin against Harriet A. Payne and the fish were delivered to it thereunder. On August 20, 1906, Steinbrugge brought a writ of replevin against the Seaboard Trading Company and obtained possession of the fish thereunder. On August 20, 1906, the Seaboard Trading Company executed to Benjamin M. Shipman a bill of sale of the barrels of alewives in question, with full power to prosecute or withdraw any suits or proceedings relating thereto, and on August 23, 1906, Shipman brought a writ of replevin against Steinbrugge and obtained possession of the fish.

Harriet A. Payne did not testify at the trial. Prescott was present but was not called as a witness. Excepting as stated in the auditor's report, there was no evidence of title in Harriet A. Payne and none that she ever took possession of the fish.

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At the close of the evidence, Steinbrugge requested that the following rulings be made and instructions be given:

"1. Upon all the evidence in the case the jury must find for the plaintiff in Harriet A. Payne *v.* Jason L. Dexter; for the plaintiff in Edward Steinbrugge *v.* The Seaboard Trading Company; and for the defendants in Seaboard Trading Company *v.* Harriet A. Payne, and Benjamin M. Shipman *v.* Edward Steinbrugge.

"2. In the action Harriet A. Payne *v.* Jason L. Dexter, no evidence having been offered to control the auditor's report, and that report being in favor of the plaintiff, the jury must find for the plaintiff.

"3. There is no sufficient evidence in these cases to warrant the jury in finding that at the time of the making of the contract between the Seaboard Trading Company and Prescott, the fish replevied in these several actions were the subject-matter of this contract.

"4. If the jury shall find that the contract for the purchase of one thousand barrels of alewives between Prescott and the Seaboard Trading Company was made on the Lord's day, although the written evidence of it was dated on a secular day, viz., June 11, 1906, that contract is void and the Seaboard Trading Company may have no benefit from it, either for money paid or materials delivered under it to Prescott."

"7. If the jury shall find that on the twenty-fifth day of July, 1906, Prescott and Gifford and Born (representing the Seaboard Trading Company) met at the latter's room in the Mansion House in Vineyard Haven and at that meeting Prescott informed Born that Gifford was not his partner, a subsequent sale by Gifford alone, of assets alleged by Gifford to belong to a partnership existing between him and Prescott, is ineffectual to pass any title in those assets to Born.

"8. If the jury shall find that on said twenty-fifth day of July Born knew that Prescott disclaimed the existence of any partnership between Gifford and himself, and that on the twenty-seventh day of the same July he caused a writ in which the Seaboard Trading Company was plaintiff and Charles L. Prescott, defendant, to be brought and these alewives to be attached upon that writ, he is estopped from denying the title to the whole of said alewives to be in Prescott on the twenty-eighth day of the same July when

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the bill of sale from Gifford to the Seaboard Trading Company was made."

"12. If the jury shall find that Prescott entered into the written contract dated May 25, 1906, with Steinbrugge doing business under the name of Lyon, Dupuy & Company, the latter became the absolute owner of all the fish taken under that contract immediately work under the contract was commenced."

The requests were refused. The judge charged the jury in substance that important questions in the case were, whether there was any partnership between Prescott and Gifford when Gifford purchased the alewives in question and when the bill of sale of them was given by Gifford to the Seaboard Trading Company, or whether there was no such partnership and Prescott in Steinbrugge's behalf had made an agency arrangement merely with Gifford, so that, when Gifford purchased the alewives, they became Steinbrugge's.

His charge with regard to the auditor's report was as follows: "This case was referred to an auditor, as is frequently done, for the purpose of having the evidence taken and the findings returned to the court. That was done. One Mr. Perry was auditor. The time for hearings was appointed. For some reason or other these hearings were continued; and Judge Sanderson gave instructions that the hearings at the specified time should go on whether both parties were represented or not. It appears in evidence that it was an *ex parte* hearing; that the Seaboard Trading Company was not represented by counsel for the reason that he was engaged in trial somewhere else and could not be there. It is a proper fact to take into consideration, in determining what weight you should give to this report, that it was an *ex parte* hearing. The evidence was *prima facie* evidence. The report is not conclusive. It is *prima facie* evidence, and that is not conclusive evidence. The parties may introduce other evidence for the purpose of controlling the report. You are not bound by the report; you are to take all the evidence together and give it such weight as you think it may be entitled to."

Without objection by Steinbrugge, the judge charged the jury as to Harriet L. Payne as follows: "It does not appear that Mrs. Payne was engaged in the business of buying and selling fish. It was contended that he conveyed to Mrs. Payne on account of cer-

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tain advances she made to him. This is hearsay testimony. Mrs. Payne has not testified. Mrs. Payne is apparently an interested party. She knows, or ought to know, what the facts are in connection with this transaction, and the fact that she does not come to testify in her own behalf, a very significant fact, may be taken into consideration for the purpose of enabling you to determine whether that was a real transaction.

"If you should find upon all the evidence that Prescott made a conveyance of this fish for a valuable consideration in the regular course of trade, and he was a partner, he having the same right as Gifford, that would pass a good title to Mrs. Payne. Suppose you should find it was not made in the regular course of trade for a valuable consideration, he would have been doing what he had no right to do as a partner, and the co-partnership would not be bound by it. Suppose he was not acting as a co-partner, but acting individually in making that bill of sale to Payne, acting as an individual, as agent of . . . [Steinbrugge.] . . . If there was not any co-partnership between Gifford and Prescott these fish belong to . . . [Steinbrugge], . . . because that is a contract, and if they were bought by this man Prescott they were bought for . . . [Steinbrugge.] . . . If that was so and he was acting individually he was trying to sell . . . [Steinbrugge's] . . . fish to Mrs. Payne. He had no right to do that and she would not be entitled to a verdict."

The jury found for the plaintiffs in the second and fourth cases and for the defendants in the first and third; and Steinbrugge alleged exceptions.

H. H. Pratt, for Edward Steinbrugge.

F. J. Geogan, (*W. A. Morse* with him,) for the Seaboard Trading Company and Benjamin M. Shipman.

SHELDON, J. These cases were all tried together and verdicts were rendered against Payne and Steinbrugge. Steinbrugge, who is hereinafter called the defendant, as he was called by the judge in charging the jury, has alleged exceptions in each case. It may be doubted whether he has any right of exception in the two cases to which he was not a party; but in view of the testimony that the interest of Payne has been transferred to him, we have preferred to treat the exceptions as properly taken in all the cases.

1. Because the cases were all tried together and all the evidence

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put in was to be considered in each case so far as applicable, and some of that evidence did tend to control the auditor's report in the case of Payne v. Dexter, the defendant's second request could not be given.

2. Nor could his first request have been given in spite of the auditor's report. It may be assumed, as his counsel has argued, that the agreement between him (acting under the name of Lyon, Dupuy and Company) and Prescott did not create a partnership between them and did not give to Prescott a right of property in the fish that should be procured under that contract, but that the fish so procured would become the property of the defendant; and the judge so ruled. But the bill of exceptions states that this agreement so far as it related to the fish here in question, was made on May 25, 1906, although added to the written agreement dated in the previous March. It also appeared that just before May 25, on a suggestion made by Gifford to Prescott, it was arranged between these parties that Gifford should secure the fishing privilege in Tisbury with money to be furnished by Prescott, and that Gifford and Prescott should divide equally the profits thereof; and on May 27 Gifford did secure that privilege. It was claimed by the Seaboard Trading Company, hereinafter called the plaintiff, which afterwards had dealings with Prescott and Gifford under which it claimed title to the fish in question, that the fishing privilege at Tisbury was bought by Gifford, not as an agent of Prescott, and not at all under the agreement between Prescott and the defendant, but as a member of a copartnership formed by Prescott and Gifford under the name of A. N. Gifford and Company, and that the fish which were taken there, and which are the subject of these replevin suits, were taken by and became the property of that firm, and not the property of the defendant. Upon this issue there was much evidence which raised a question for the jury to pass upon. In substance and very clearly the judge instructed the jury that if the purchase of this fishing privilege was made by Prescott, or by Gifford as Prescott's agent, under the agreement between the defendant and Prescott, then the fish taken under it became the property of the defendant, and the claim of the plaintiff failed. The cases could not have been taken from the jury.

3. The third request was rightly refused. The subject matter thereof was for the jury. As the judge said, there was nothing in

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the agreement itself to show to what fish it referred; but there was other evidence. Nor, for the reasons next to be stated, was this a material question.

4. As to the fourth request, it is enough to say that as the case was submitted to the jury the agreement of June 11 between the plaintiff and Prescott was immaterial. The plaintiff's right was made to depend entirely upon the questions whether a partnership had been created between Gifford and Prescott, whether the fishing privilege in Tisbury had been acquired by that firm and the fish had become its property, whether the plaintiff had gained title to the fish under the bill of sale given to it, as it claimed, by A. N. Gifford and Company acting through Gifford, and whether that property had been finally transferred to Shipman, who brought the last of the suits. Under these circumstances the defendant was not harmed by the failure to give its fourth request.

5. It was not material to the real issues in this case whether Prescott had misused the defendant's money in his hands by applying it for the benefit of the firm of A. N. Gifford and Company. The defendant could not follow the money or its proceeds against Gifford or his firm or those claiming under them, under the circumstances here presented. There was no evidence that Prescott disclosed to Gifford his wrongful use of the defendant's money, and it could not be presumed that he had done so. If that fact had been disclosed it would have had a material bearing on the question of Gifford's good faith and whether a partnership had really been created.

6. The seventh and eighth requests could not have been given. If the partnership really existed, as the jury must have found that it did, Prescott's denial of it could not affect the rights of one dealing with the firm or with the other member thereof within the limits of the agency created by the partnership. This is elementary. The conduct of the plaintiff's agent Born in attaching the fish in behalf of the plaintiff as the property of Prescott might create an estoppel in favor of any one who claimed under that attachment or had acted under it to his injury or whose rights were destroyed or injuriously affected thereby. Such in principle are the cases relied on by the defendant. *Daniels* v. *Tearney*, 102 U. S. 415. *United States* v. *Hodson*, 10 Wall. 395, 409. But the defendant is in no such position and cannot claim the benefit of an estoppel.

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7. The twelfth request was rightly refused. The defendant could not become the absolute owner of the fish at Tisbury before they were caught, although work under his agreement with Prescott already had been begun at other places. The matter of this request was correctly dealt with in what was said to the jury.

8. The judge properly ruled that the auditor's report was *prima facie* evidence. There was nothing objectionable in his other instructions as to this.

Looking at all the exceptions which have not been expressly waived, we find no error in the record.

Exceptions overruled.

CHARLES E. LYMAN *vs.* COMMISSIONERS ON FISHERIES AND GAME.

Berkshire. September 12, 1911. — January 8, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Fish and Game Commissioners. Constitutional Law. Words, "Of sufficient value."

In R. L. c. 91, § 8, as amended by St. 1906, c. 356, § 1, giving to the commissioners on fisheries and game, in case they "determine that the fish of any brook or stream in this Commonwealth are of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from saw mills," power to prohibit or regulate the discharge of sawdust from any particular sawmill which they find materially injures such fish, the words "of sufficient value" do not mean merely "of sufficient commercial value," but they mean "of sufficient value to make the preservation and multiplication of the fish worth while, taking all the circumstances into account."

On the hearing in the Superior Court of a petition to annul or alter an order of the commissioners on fisheries and game made under R. L. c. 91, § 8, as amended by St. 1906, c. 356, § 1, empowering them, if they determined that the fish of any brook or stream were of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from sawmills and that the discharge of sawdust from any particular mill materially injured such fish, to prohibit or regulate such discharge, the presiding judge confirmed the order and in doing so refused to find that carrying it out would render the business of the sawmill affected unprofitable or compel its proprietor to give it up, and it was *held,* that it was not open to such proprietor to contend, upon a report of the case to this court, that the regulation was not a reasonable one.

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Section 8 of R. L. c. 91, as amended by St. 1906, c. 356, § 1, which gave to the commissioners on fisheries and game, in case they "determine that the fish of any brook or stream in this Commonwealth are of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from sawmills," power to prohibit or regulate the discharge of sawdust from any particular sawmill which they found materially injured such fish, was not unconstitutional as class legislation arbitrarily selecting sawmills for regulation or prohibition from among all other industries using streams for the discharge of waste products.

MORTON, J. This is a petition to the Superior Court under St. 1906, c. 356, § 1, amending R. L. c. 91, § 8, in the nature of an appeal from an order of the commissioners on fisheries and game prohibiting the petitioner from discharging sawdust from a mill owned by him into the stream on which it is situated in the town of Becket, and from accumulating sawdust on the bank thereof so that it will be liable to fall or be swept into the stream, and requiring him to erect a blower or to take other measures to prevent the discharge of sawdust from the mill into the stream. The case was heard by the Chief Justice of the Superior Court, who took a view and made a report of his findings, and affirmed the order of the respondents. The petitioner requested certain rulings which were refused, and the case is here on exceptions taken by him to the refusal of the Chief Justice to rule as requested.

The statute provides that ". . . If the commissioners determine that the fish of any brook or stream in this Commonwealth are of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from sawmills, and that the discharge of sawdust from any particular sawmill materially injures such fish, they may, by an order in writing to the owner or tenant of such sawmill, prohibit or regulate the discharge of sawdust therefrom into such brook or stream." St. 1906, c. 356, § 1.

The petitioner contends that by the words "of sufficient value" is meant "of sufficient commercial value," or of sufficient value to justify devoting the stream to fishing instead of to industry. But we think that there is nothing in the statute which warrants or requires such a construction or which shows that that is what the Legislature meant by the words "of sufficient value." It rarely, if ever, would happen that "the fish," or "the fisheries," as the statute as amended by St. 1910, c. 460, now reads, "of any brook or stream" would be of sufficient value commercially to warrant devoting the brook or stream to them to the exclusion of industrial

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pursuits. It would be unreasonable therefore to suppose that the Legislature used the words "of sufficient value" in the sense contended for. From time immemorial the Legislature has regulated and controlled in the public interest the fisheries in the brooks and streams of the Commonwealth. The case has been and is one of conflicting rights, and the Legislature has governed itself accordingly. It has not undertaken to legislate in favor of one set of rights as opposed to another set of rights, but to act with due regard to the rights of all concerned.

There is nothing in the statute under consideration to show that the Legislature intended to depart from the policy which it had theretofore pursued, and we think that by the words "of sufficient value" is meant of value sufficient to make the preservation and multiplication of the fish in the brook or stream worth while taking all the circumstances into account, the kind of fish, for instance, their number, the suitableness of the stream for propagating and preserving them, its location and the opportunities afforded by it for enjoyment, the benefit that would result, and the nature of such rules and regulations as would have to be established and their effect upon such industries, if any, as there are upon the banks of the stream. In other words, the question is whether, taking all things into consideration, it is worth while to attempt to save the fish or not. Amongst the considerations which may properly be taken into account is the rest, recreation and enjoyment that will be afforded to such of the public as may desire to resort to the stream for the purpose of angling. In laying out a way selectmen have a right to take into account the fact that pleasure travel will be accommodated as well as business travel. *Higginson* v. *Nahant*, 11 Allen, 530. There was no error, therefore, on the part of the Chief Justice in ruling as he did, in effect, that such considerations could properly be taken into account in determining whether the fish were of sufficient value to warrant the prohibition of the discharge of sawdust into the stream from the petitioner's mill. There is nothing inconsistent with the conclusion here reached in *Commonwealth* v. *Boston Advertising Co.* 188 Mass. 348.

The petitioner also contends that the order constituted in substance and effect a taking of his property without compensation, and was therefore in violation of the Constitution of the United States and of this Commonwealth. There is no doubt that the

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regulation adopted in any given case by the commissioners must be a reasonable regulation, and that if in such case the regulation adopted by them imposes upon the landowner a burden so oppressive and restrictive as entirely to prevent the pursuit of an otherwise lawful and harmless employment or business and thereby deprives the landowner of a valuable right of property, the regulation would be open to the objection urged by the petitioner that it constituted a taking of property without due compensation. But that is not the present case. The petitioner contended at the hearing before the Chief Justice that to prohibit him from discharging sawdust into the stream and to require him to instal a blower for the removal of sawdust and to use some of the well known devices for disposing of the same would render his business unprofitable and compel him to give it up. In regard to this contention the Chief Justice says "I do not so find." As the case stands, therefore, there is nothing to show that the order adopted by the commissioners will have the effect contended for by the petitioner or that taking all of the circumstances into account the regulation is not a reasonable one.

The petitioner still further contends that the selection of sawmills from all other industries * using streams for the discharge of waste products was an arbitrary selection and that the statute was therefore open to the objection that it was class legislation and for that reason was unconstitutional. The statute of which the one under consideration is an amendment was held to be constitutional in *Commonwealth* v. *Sisson*, 189 Mass. 247. The point now made does not appear to have been raised in that case, but we do not see why the grounds on which that case was decided do not necessarily dispose of the objection. It was expressly decided in that case that it was within the power of the Legislature to protect and preserve edible fish in the brooks and streams of the Commonwealth and for that purpose to forbid the discharge of sawdust into any brook containing such fish. The Legislature would have no right arbitrarily to select sawmills from other industries using the brooks or streams on which they were situated, for the deposit of waste products, and forbid them to discharge sawdust into the brooks or streams, and the fact therefore that it

* See now St. 1910, c. 460.

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was decided in *Commonwealth* v. *Sisson* that the statute was constitutional shows that the court must have been of the opinion that the case was not one of the arbitrary selection of a class, but one in which there were good reasons for forbidding the discharge of sawdust into brooks and streams, and in which the action of the Legislature in so doing was therefore justifiable. Apart from *Commonwealth* v. *Sisson* the statute would not be unconstitutional as class legislation for reasons which we have suggested in commenting on *Commonwealth* v. *Sisson*. See *Commonwealth* v. *Interstate Consolidated Street Railway*, 187 Mass. 436.

The result is that the exceptions must be overruled.

So ordered.

M. B. Warner, (*J. Barker* with him,) for the petitioner.

J. M. Swift, Attorney General, & *A. Marshall*, Assistant Attorney General, for the respondents.

BLACKSTONE MANUFACTURING COMPANY *vs.* INHABITANTS OF BLACKSTONE.

214 - 90
217 - 65

Worcester. October 3, 1911. — January 8, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Water Rights. Tax, Assessment. *Conflict of Laws.*

It having been decided at a previous stage of this case in a decision reported in 200 Mass. 82, that the value for purposes of taxation of land in this Commonwealth adjoining the boundary line of Rhode Island, through which flowed a river with a fall in both States furnishing a valuable water power which the petitioner applied in a power house erected by it in Rhode Island, should be determined in reference to any and all uses to which it was adapted, including the furnishing of power to be used on the petitioner's wheels in Rhode Island, and a rescript having issued accordingly, the case was recommitted to an auditor, who made a report in accordance with the principles of law stated in the rescript, and, a judge of the Superior Court having made findings of fact and rulings of law in accordance with such supplemental report of the auditor, and having reported the case for determination by this court, it was *held*, affirming the former decision, that judgment should be entered in accordance with the auditor's supplemental report.

On a petition appealing from a refusal of the assessors of a town to abate a tax, brought against the town by a corporation owning a parcel of land which

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was partly therein and partly on the other side of the boundary line between Massachusetts and Rhode Island and which contained a water power privilege in both States which the petitioner applied to wheels in a power house in Rhode Island, where the issue is, what is the proper basis of valuation of the property to be taxed in Massachusetts, the law of Rhode Island with relation to mills and mill privileges is not material.

In determining what valuation for the purposes of taxation should be placed upon so much of the property of a manufacturing corporation owning a parcel of property which is on both sides of the boundary line between this State and Rhode Island as is in this State, the whole parcel containing a water power privilege in both States which the corporation applies to wheels wholly in Rhode Island, it cannot be said as a matter of law that it is improper to use as a determining factor the relative fall of the water in each State.

PETITION, filed in the Superior Court on October 1, 1906, under R. L. c. 12, § 78, on appealing from a refusal of the assessors of the town of Blackstone to abate a tax assessed to the petitioner for the year 1905.

The case was referred to James A. Stiles, Esquire, as auditor, and then was heard upon the auditor's report and the pleadings by *Gaskill*, J., who found *pro forma* in accordance with the findings of fact and rulings of law of the auditor and reported the case for determination by this court, whereupon the decision described in the opinion and reported in 200 Mass. 82 was made. Thereafter the case was recommitted to the auditor. The substance of the auditor's supplemental report is stated in the opinion.

The case then was heard on the pleadings and the auditor's supplemental report by *Hitchcock*, J., who found and ruled in accordance with the report and reported the case for determination by this court, the parties agreeing that, if such rulings and findings were correct, judgment was to be entered in accordance therewith; otherwise, such order and entry of judgment were to be made as to this court might appear to be just and in accordance with the law applicable to the case.

T. H. Gage, (*F. F. Dresser* with him,) for the petitioner.

H. H. Thayer, for the respondent.

HAMMOND, J. At the former hearing of the case before us it was held (200 Mass. 82) that the principle of taxation adopted in *Boston Manuf. Co.* v. *Newton*, 22 Pick. 22, was not applicable when, as here, a part only of the privilege was in this State.

Upon this point Knowlton, C. J., 200 Mass. 92, uses the following language: "In the present case . . . the land [in Massachu-

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setts] is held, with its appurtenances and all its natural qualities, by a single owner. It should be taxed to the petitioner, with all its elements of value. Among these are the right to use the flow of the water in connection with the fall of the stream to produce power, and to sell it for that purpose, either to be used in Massachusetts or to be carried into Rhode Island and used with an additional fall there. The use in Rhode Island is not to be taxed separately, as water power existing and applied there, but all the elements and qualities of the real estate which unite to produce the water power in Rhode Island and which combine to give it value there are to be considered. In determining the value of these features of the real estate in Massachusetts, the uses to which power could be put in Blackstone are to be considered, and the uses to which it is put in connection with the additional fall and the structures in Rhode Island are to be regarded. *Lowell* v. *County Commissioners*, 152 Mass. 372.

"If the value of all such elements, those in Rhode Island, as well as those in Massachusetts, which combine to produce the entire water power at the wheels is ascertained, the inquiry will then be, what part of this value is imputable to the real estate in Massachusetts. The answer to such an inquiry would be in part an estimate, but it would not be unlike estimates that are frequently made in determining the rights of parties."

And the order was that "The findings of the Superior Court should be set aside, and the value of the property in question should be determined, either by a recommittal to the auditor or otherwise, in reference to any and all uses to which it is adapted, including the furnishing of power to be used on the petitioner's wheels in Rhode Island;" and the rescript went accordingly.

In compliance with the rescript the case was recommitted by the Superior Court to the auditor. At the hearing under this order the auditor rightly ruled, against the objection of the petitioner, that he would consider all evidence given at the former hearings before him and any other evidence which the respondent might wish to present upon the value of the village land in question in the light of the former decision of this court. At the hearing it developed that both the parties and the auditor were in error with relation to the amount of head, stated in the former report to be twenty-nine feet, that could be developed from the privilege of the

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petitioner at the old mill yard. And he found in accordance with the agreement of the parties that "the head of water capable of development both at the old mill yard in Blackstone, Massachusetts, and at the present location of the wheels in Smithfield, Rhode Island, is the same and amounts to 31.56 feet but this head of 31.56 feet was not used prior to the erection of the power house in Rhode Island in 1904."

The auditor describes the whole mill property in detail, which description with the exception of this error is in all material respects like that given in the former report of this case (see 200 Mass. 85, 86), to which reference may be had.

The case is before us upon a report of the Superior Court, where the case was heard upon the pleadings, the auditor's report and certain requests for rulings presented by the respective parties, these requests being the same as those which had been presented at the hearing before the auditor.

The main question is whether, either in the rule adopted by the auditor and followed by the court, or in the method of its application to the circumstances of this case, there was error in law. Upon this matter the auditor reports as follows:

"I find that the dam, pond above it, the river with land on both sides of it, and its fall of 13.88 feet all in Massachusetts furnish an opportunity for the economical development of a separate privilege and which separately would be of value.

"I find that the river, with the land on both sides of it in Rhode Island, together with its fall of 17.68 feet, furnish an opportunity for the economical development of another separate privilege, which likewise would separately be of value. Neither of these privileges were actually developed on May 1, 1905, nor had they ever been so developed as separate privileges.

"Evidence of the value of these separate privileges was offered by the petitioner upon which evidence I can find the value of these separate privileges in each State and the value of the 'increment of combination' so called of them but I have made no finding thereon.

"I find and rule, however, that the entire property in both States belonging to the petitioner and used by it in developing water power, constitute together but one privilege, a unit which is of greater value than the sum of the values of the two separate privi-

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leges just described; that the power of the water can be applied either in the old mill yards 'A B C' situated in Blackstone, Massachusetts, or at the new power house situated in Smithfield, Rhode Island; that on May 1, 1905, the entire power of the water, capable of economical development at this privilege, was actually applied in Rhode Island, and that whether applied in Massachusetts or in Rhode Island the agreed head of 31.56 feet is made up of the fall of 13.88 feet of the river in Massachusetts and of the 17.68 feet of the river in Rhode Island, and whether used in one State or the other, both of these falls are necessary to create the head of 31.56 feet, which is the head belonging to petitioners' privilege and utilized by it. I further find that the general method of utilizing this entire privilege which was adopted by the petitioner, was the most advantageous and economical development that could be adopted whether the water was applied in Rhode Island or Massachusetts; and that on May 1, 1905, the most advantageous and economical method of then utilizing the privilege was the method then actually used, any other use necessitating an expenditure of a large amount of money.

"A. I find that the fair cash value of the petitioners' entire privilege situated both in the town of Blackstone, Massachusetts, and Smithfield, Rhode Island, was on May 1, 1905, $140,000. This sum represents the fair cash value, the sum for which it would exchange for in cash on May 1, 1905, in view of all the purposes for which it was naturally adapted. The privilege thus valued includes the land of the petitioners on both sides of the Blackstone River situated in the States of Massachusetts and Rhode Island, the dam, canals, and other structures (but not the power house), land under the same, the pond, and flowage rights and sufficient land to enable the owner to avail himself of the opportunity afforded by the situation, situated as they are with the flow of water, the fall in the river, and all those things which are necessary to enable the owner to make use of his opportunity and create a valuable water power, and with their capacity to 'hold the water of the river and create power.'

"The value of the 61⅜ acres, none of which, as appears by my former report, was situated under the water or other structures used in connection with this privilege or used in connection with them, is not included in this value.

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"I have considered the original cost of the structures, the replacement cost, the amount of the use, and the fact that such use was of a profitable nature as evidence but have not adopted them as a test.

"I find there is no method generally accepted by engineers by which the value of a privilege may be apportioned between its separate parts.

"I have separately valued that part of the petitioners' privilege situated in Massachusetts as described in the assessment, viz.: 'Village land and privileges, including dam and other structures for the development of water power' and find its fair cash value as heretofore defined, to have been upon May 1, 1905, $90,225.

"In arriving at this value I have revalued the village land 61⅜ acres, none of which was necessary to the enjoyment of the privilege as used May 1, 1905, with reference to all the buildings thereon and in use together and with reference to its location near the privilege herein described and to all the reasonable possibilities due to its location, and find its fair cash value on May 1, 1905, was $30,025. None of this 61⅜ acres, village land is included in the privilege heretofore valued and no part of the value ($30,025) assigned to said village land is included in the ($140,000) assigned as the value of the entire privilege.

"I have heretofore found, as requested by the petitioners, that two separate privileges could be carved out of the entire privilege owned by petitioner and that the entire privilege, i. e. the combination of these two is of greater value than the sum of the two separate ones. . . .

"I rule that the State cannot authorize nor the assessors of Blackstone assess a tax upon any property lying outside the State, but the petitioners' property in both States was one single privilege and in arriving at the fair cash value of that part of this privilege lying within the State of Massachusetts, I find and rule that the fair cash value of this entire privilege is something more than the aggregate of the values of its separate parts operated separately. It is the aggregate of those values plus whatever value if any may be due to combining these parts into a larger whole; that each part of the privilege both gives to and receives from each other part some value; that it may fairly be said each part of the privilege contributes to the whole, not merely the value arising from

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a separate development but a value based on the proportion that it bears in some respect to the whole or to some factor of the whole; that the principal factor in the entire privilege common to both States and the thing without which all else is useless, and the structures valueless, is the fall in the river and the opportunity thereby conferred upon the owner of the shore of the river within the limits of the privilege to create a water power; that without this fall in the river caused by the declivity thereof in Massachusetts and the fall in the river in Rhode Island caused by the declivity thereof, and the ownership of the shore of the river in both States, the privilege as it existed on May 1, 1905, was impossible; that each State is entitled to consider as within its territorial jurisdiction and subject to its taxes a proportionate part of the value due to the development of the entire property as a single privilege, equal to an amount which bears the same proportion to the value of the entire privilege as the fall in the river in Massachusetts bears to the entire fall in the river belonging to the privilege and not including in said value any property in the other State.

"I have therefore apportioned the value of the entire privilege, viz.: $140,000.00, between the two States, found the value of the Massachusetts portion to be $60,200.00, and to this amount add the value of the village land (viz.: $30,025.00), making the value of the 'privilege with dam and other structures for the development of water power' as heretofore stated to be $90,225.00.

"I have considered the land, dam, structures for the production of water power, the flow of the water, and canals and water ways by which the water of the river is taken across the tangent aforesaid to be applied on the wheels in Rhode Island, the land, the right to set back the flow of water in the river in connection with the fall thereof in order to produce power and to sell it, either to be used in Massachusetts or to be carried into Rhode Island, the uses to which power could be put in Blackstone or elsewhere, its location with reference to the surrounding land and especially its value with reference to the value which it contributes to the value of petitioners' entire property, but have not otherwise included in the value of the Massachusetts privilege, any portion of the value of the petitioners' property in Rhode Island."

It thus appears clearly that in considering the value of the privilege belonging to the land in Massachusetts the auditor took

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into consideration its value as a part of the whole privilege as developed in Rhode Island. The rule thus adopted by him and followed by the court was in substance the same as that prescribed by this court as hereinbefore stated, namely: "In determining the value of these features of the real estate in Massachusetts, the uses to which power could be put in Blackstone are to be considered, and the uses to which it is put in connection with the additional fall and the structures in Rhode Island." It appears from this second report of the auditor that the law of Rhode Island with relation to mills and mill privileges is substantially the same as in this Commonwealth, but he rightly ruled that the Rhode Island law is not material to the present issue. So far as refers to the rule to be adopted the case stands in all material respects the same as when it was here before. For reasons stated in the former opinion we remain satisfied with it. The rule adopted by the auditor and the court was correct.

It is argued however by both parties that in applying the rule to the circumstances of this case there was error in that the relative fall of the water in each State was made the determining factor. The petitioner contends on its part that the special part of the unit privilege which is contributed by the privilege belonging to the land in Blackstone is incapable of estimation, and that in any event the valuation of the land and structures in Massachusetts based upon their participation in the value of the whole single water power development is necessarily a valuation of property lying in Rhode Island, and any valuation and tax thereon so made is in violation of the "due process clause of the Fourteenth Amendment of the United States Constitution." The respondent on its part, while contesting the soundness of the petitioner's contentions, urges that in making use of this water power the structures including dam and canals were in the main erected upon the land in Massachusetts, and in making use of them for seventy-five years in the manner stated by the auditor the petitioner has straightened the course of the river, taking it out of Rhode Island, substituting for the natural course and fall the present artificial course and fall, and that so long as these structures remain they should be taxed there and that the value of the land should be fixed regardless of whatever fall there may be in the river in Rhode Island before its return to Massachusetts.

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But neither contention seems to us sound. It cannot be ruled as matter of law either that it is impossible to make a fair estimate of the relative value of that part of the water privilege situated in Massachusetts sufficiently accurate for purposes of assessment, nor that upon all the evidence the auditor has wrongly applied the rule.

The petitioner made thirty requests for rulings and the respondent made twenty-two. Some of them were given and some refused. It is unnecessary to go over them further in detail. They have been considered and no error appears in the manner in which the court dealt with them.

Judgment for the petitioner in the sum of $791.50, with interest thereon from October 30, 1905.

ROBERT E. MAGUIRE *vs.* PAN-AMERICAN AMUSEMENT COMPANY & others.

Suffolk. November 23, 24, 1911. — January 9, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Bond, Replevin. *Evidence,* Relevancy, Presumptions and burden of proof, Of value. *Damages,* In action on replevin bond. *Practice, Civil,* Exceptions.

At a trial for the assessment of damages in an action by a deputy sheriff on a replevin bond, where it appeared that the property replevied from the plaintiff had been attached by him in a certain action, the plaintiff, against the objection of the defendants, was allowed to put in evidence the writ, declaration, and execution in the action in which he made the attachment. The presiding judge instructed the jury that the amount of the judgment in that action would not affect the damages to be recovered by the plaintiff, which were to be assessed at the fair market value of the property, and that the papers were admitted only "to show out of what this transaction here arose." *Held,* that the papers relating to the action in which the attachment was made were not admissible, and properly might have been excluded by the judge as being irrelevant matter which could tend only to prejudice the defendants by enhancing damages, but that, there being a presumption that the jury followed the instructions of the judge, it would be assumed that the defendants were not harmed.

At the trial of an action on a replevin bond, in which the damages were to be assessed by the jury, it appeared that the property replevied from the plaintiff had been attached by him as a deputy sheriff and consisted of scenery, cos-

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tumes and theatrical properties then being used in a certain play, and that the plaintiff was entitled to recover the fair market value of the property at the date of the final judgment in the action of replevin. There was conflicting evidence as to the value of the scenery, costumes and other property replevied, with and without the playing rights. The defendants asked the presiding judge to rule that the jury could not consider what the value of the property was on the stage as used in the play and that its value was what it would bring at a sheriff's sale at the date of the final judgment. The judge refused to make these rulings. *Held*, that the plaintiff was entitled to have the jury in estimating the value of the property consider the probable conditions that a bidder at a sale of the property might have acquired or might have believed that he could acquire the play or that the owner of the play might have attended the sale as a bidder, and that, the rulings requested having omitted all reference to these considerations, the judge was right in refusing to make them.

Upon the question of the fair market value of personal property, the presiding judge at a trial properly may instruct the jury to disregard testimony as to a sale of the property at auction which is indefinite and uncertain and contains no statement of a definite price.

The limiting of the cross-examination of a witness on collateral issues for the purpose of impeaching his credibility is within the discretion of the presiding judge, to the exercise of which no exception lies.

CONTRACT by a deputy sheriff on a replevin bond. Writ dated May 4, 1906.

In the Superior Court the case first was tried before *Brown*, J., who at the close of the evidence ordered a verdict for the plaintiff in the penal sum of the bond, which was $10,000, and that damages be assessed in the sum of $6,461.50. Both the plaintiff and the defendants alleged exceptions. The exceptions of the plaintiff were overruled and those of the defendants were sustained in a decision of this court reported in 205 Mass. 64.

There was a new trial before *King*, J., at which, among other facts, appeared the following: The plaintiff as a deputy sheriff on September 9, 1902, on a writ issued in an action brought by one Messenger against the Lederer Amusement Company attached certain scenery, costumes and theatrical properties then being used in a musical production or play called "The Wild Rose" at the Colonial Theatre in Boston. On September 11, 1902, the property was taken out of the plaintiff's hands on a writ issued from the Circuit Court of the United States in the District of Massachusetts in an action of replevin brought against the plaintiff by the Pan-American Amusement Company, the alleged purchaser of the property from the Lederer Amusement Company. In

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that action the Pan-American Amusement Company, the present defendant, gave to the present plaintiff the bond here sued upon. In the action of replevin, on November 17, 1904, the jury returned a verdict for the present plaintiff as the defendant in replevin. After a judgment of the United States Circuit Court of Appeals affirming the rulings of the Circuit Court, on January 18, 1906, a final judgment was entered in the Circuit Court for the return to the present plaintiff of all the property replevied and for damages and costs. On February 16, 1906, execution was issued and on April 20, 1906, was returned to court in no part satisfied.

The plaintiff offered in evidence the writ, declaration, execution and alias execution in the action of Messenger *v.* Lederer Amusement Company. The defendants objected to the admission of this evidence on the ground that the action was not between the same parties as those in the present action; that it was immaterial; and that such evidence might affect the verdict of the jury. The judge admitted the evidence, and the defendants excepted. The instructions of the judge in regard to this evidence and the purpose to which it was limited are stated in the opinion.

One Lederer, who was the managing director of the Lederer Amusement Company, was called by the defendants as a witness. On his direct examination he was asked the question, "I think there is one more question, Mr. Lederer, with reference to the production of 'The Wild Rose,' and all plays for that matter. After the play is produced what do you have to do, or what did you do for the purpose of procuring bookings or places to perform this play?" The counsel for the defendants stated "that he intended to show by that that it is necessary to bring a play to a sort of a clearing house where plays are routed throughout the United States; that all plays cannot be routed; that unless a play has the trade mark of a prominent manager, or a successful manager, or has intrinsic merit itself, . . . a route cannot be had. So, if this property was taken up by somebody else who was not a theatrical manager, had no standing, who would allow the personnel of the company to deteriorate, could not keep it up to standard, they could not get any bookings at all and therefore it would be useless." The plaintiff objected to the question and the judge sustained the objection. The defendants excepted. The indefinite character of the direct testimony of this witness in regard to

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a sale at auction, which the judge instructed the jury to disregard, and also the character of the evidence admitted, against the objection of the defendants, on his cross-examination for the purpose of contradicting his statements, are indicated sufficiently in the opinion.

There was conflicting evidence from various witnesses as to the value of the costumes, scenery and other property replevied, with and without the playing rights.

At the close of the evidence, the defendants asked the judge to make nine rulings, of which those that are material were as follows:

"1. The jury shall not consider what the value of the property was on the stage and in use in the production of the play of 'The Wild Rose' on the tenth day of September, 1902.

"2. The jury shall not consider what the value of the property was to the Pan-American Amusement Company on September 10, 1902, in their using it for producing purposes in connection with the production of 'The Wild Rose.'"

"4. The value of the goods which can be recovered in this action is what they would bring at sheriff's sale in Boston, on January 18, 1906."

The judge refused to make these rulings.

The jury returned a verdict for the plaintiff in the penal sum of the bond, and assessed damages in the sum of $7,350.50. The defendants alleged exceptions.

J. F. Lynch, for the defendants.

E. R. Anderson, (*F. M. Whitman* with him,) for the plaintiff.

BRALEY, J. The defendants were not liable for the penal sum, unless a breach of the replevin bond declared on was proved; and when the plaintiff had introduced evidence, that at the trial of the action he recovered judgment for damages and for a return of the property, and that the execution which issued thereon had been returned in no part satisfied, the jury, without further testimony, would have been warranted in finding that the damages had not been satisfied or the property given up, and consequently the condition had been broken. *Parker* v. *Simonds*, 8 Met. 205. *Wright* v. *Quirk*, 105 Mass. 44. *Capen* v. *Bartlett*, 153 Mass. 346.

The plaintiff's cause of action not having depended on the result of the action in which as a deputy sheriff he attached the property

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replevied, the writ, declaration, execution, and alias execution in that litigation, should not have been admitted. If the defendants had prevailed, the plaintiff still would have been accountable to the true owner, and his cause of action depended in the present action upon the instrument. *Moore* v. *Quirk*, 105 Mass. 49. The trial court well might have paused before admitting evidence which could only tend to prejudice the defendants by enhancing damages. But, the jury having been instructed that the amount of the judgment in the original action would not affect damages, which were to be assessed at the fair market value of the property, and that the papers were admitted only "to show out of what this transaction here arose," we are inclined to hold with some hesitation that it is to be presumed that the instructions were followed, and the defendants were not harmed. *Burghardt* v. *Van Deusen*, 4 Allen, 374. *Warner* v. *Jones*, 140 Mass. 216. *Dixon* v. *Smith*, 181 Mass. 218. *Troy* v. *Rudnick*, 198 Mass. 563, 568, 569.

Under a practice which was said to be anomalous in *Hudson* v. *Miles*, 185 Mass. 582, 588, the jury also, if they found a breach, were to determine for what amount execution should issue. *Newburyport* v. *Davis*, 209 Mass. 126, 132. R. L. c. 177, §§ 9, 10. The defendants obligated themselves to restore the property in the same condition as of the time when it was taken, and the measure of damages recoverable was stated when this case was first before us, by Sheldon, J. "The plaintiff is entitled to the fair market value of the property in that order and condition as of the time when it should have been delivered to him, that is, on the date of the final judgment in the replevin suit." *Maguire* v. *Pan-American Amusement Co.* 205 Mass. 64, 73.

The property consisted of "sceneries, costumes and properties" adapted for, and used in, the presentation of a musical production or play, entitled "The Wild Rose." Its value when thus employed might be much greater than the price it would bring in the market at an auction sale independently of the play, which the evidence does not positively show the purchaser could control and present to the public. It cannot be said, however, that there was no market value, as was held in *Green* v. *Boston & Lowell Railroad*, 128 Mass. 221, 226, where a family portrait had been lost by the carrier; and the exceptions state, that "there was conflicting evidence from va-

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rious witnesses as to the value of the costumes, scenery and other property replevied, with and without the playing rights." The fair market value "is at least the highest price which a normal purchaser not under peculiar compulsion will pay at the time and place in question in order to get the thing," said Holmes, J., in *Bradley* v. *Hooker*, 175 Mass. 142, 143, which was followed in *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, 262, and *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37. A purchaser might buy the whole with the intention of adapting the property to other uses, or he might have acquired, or believed that he could acquire the play, and accordingly would be willing to pay an enhanced price; or the owners of the play at the date of the attachment if a sale had been held, might have attended and bid. The plaintiff was entitled to have the jury consider these probable conditions in their estimation of market value, and the first, second and fourth requests having omitted any reference to them, were insufficient. *Stevens* v. *Tuite*, 104 Mass. 328, 331, 336.

The success or failure of the play as a theatrical enterprise, ordinarily would depend largely upon proper management, and evidence of what would have to be done for its successful presentation had a direct bearing upon the value of the property if purchased to be used in the business. But the question asked of the witness Lederer, not having been limited to the play in question, was irrelevant. The further testimony of this witness as to the sale at auction, having been indefinite and uncertain with no statement of a definite price, was properly withdrawn from the jury and excluded. It is not an approximate but the substantially accurate result in money obtained for property sold which furnishes the criterion and imparts evidentiary value. *Atherton* v. *Emerson*, 199 Mass. 199, 210, and cases cited.

It also was discretionary as to how far the credibility of this witness could be impeached by cross-examination on collateral issues, and the ruling admitting in evidence for this purpose his report to the directors of the company which bore his name, of its financial condition resulting from the production of the play, was not subject to exception. *Jennings* v. *Rooney*, 183 Mass. 577, 579.

The fifth and sixth requests were waived at the argument, and the third, seventh, eighth and ninth, and the exceptions

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to the instructions, not having been argued, must be treated as waived.

We have considered all of the exceptions relied on by the defendants, and are of opinion for the reasons given, that they should be overruled.

So ordered.

BERLIN MILLS COMPANY *vs.* WILLIAM S. LOWE & others.

Suffolk. December 7, 1911. — January 9, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, To reach and apply equitable assets, Property in the custody of the law.

Money in the custody of a clerk of court, which was paid into court under R. L. c. 173, § 37, by the defendant in an action of law, not brought for the benefit of creditors, to which the plaintiff in that action is entitled and which belongs to her husband, cannot be reached and applied by a creditor of such husband in a suit in equity under R. L. c. 159, § 3, cl. 7.

BILL IN EQUITY, filed in the Superior Court on July 14, 1911, under R. L. c. 159, § 3, cl. 7, alleging that the defendant William S. Lowe as the indorser of certain promissory notes owed the plaintiff the sum of $817.04, and that said defendant was the lawful owner of $866.97 in cash, which was in the custody of the clerk of the Superior Court, although such fund was claimed by the defendant Margaret H. Lowe, as stated in the opinion; praying that the plaintiff's claim might be established, that the defendants Margaret H. Lowe and William S. Lowe, and also the counsel for William S. Lowe, who was made a defendant, might be restrained from collecting said fund in the custody of the clerk of the court or from making any transfer or assignment of such fund, that judgment in the action in which such fund was held might not be entered and that such action might be continued for judgment until the determination of this suit, that it might be decreed that the defendant William S. Lowe was the owner of said fund in the custody of the clerk of the court and that the plaintiff was entitled to be paid its claim out of said fund, and that an order might be issued

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directing the clerk of the court to pay the plaintiff's claim and costs out of said fund in so much as it might be found to be sufficient therefor.

The three defendants severally demurred to the bill. There was a stipulation of the parties that the fund paid into court in the case of Margaret H. Lowe *v.* India Mutual Fire Insurance Company, which was the action referred to above, should remain in the custody of the clerk of the court until final disposition was made of this case.

The case was heard upon the demurrers of the defendants by *Hardy*, J., who made a final decree that the bill be dismissed. The plaintiff appealed.

C. W. Dealtry, for the plaintiff.

L. L. G. de Rochemont, for the defendants.

SHELDON, J. The money which the plaintiff seeks, under R. L. c. 159, § 3, cl. 7, to reach and apply as the property of William S. Lowe standing in the name of his wife Margaret H. Lowe, is in the custody of the law. She had brought an action in the Superior Court against an insurance company for the amount which had become due under a policy of insurance and to which she alleged that she was entitled. The insurance company admitted its liability, and by leave of court paid into court the amount claimed, under R. L. c. 173, § 37; and a third party, upon notice issued to him, appeared and claimed that the money was due to him, and he was substituted for the defendant in that action. Afterwards he withdrew his claim, and it was dismissed by an agreement between him and Mrs. Lowe. Accordingly in that action she has maintained her right to the fund; she would be entitled to judgment against the insurance company if it had not paid the money into court; and so far as that case is concerned she is entitled to have the money paid to her. The money is in the custody of the clerk of the Superior Court. The question is whether the plaintiff can reach and apply it to the payment of its demand against her husband; and that depends upon whether the fund, because in the custody of the law, is beyond the reach of creditors of her husband.

As to Mrs. Lowe, the fund has been paid into court without her consent, upon the application of the insurance company which on paying it into court ceased to be a party to her action. As it now

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appears, she was entitled to a judgment and execution for the amount of her claim, but the order of the Superior Court, made under the authority of the statute (R. L. c. 173, § 37), took that right away from her and substituted a right to this fund if she should show herself entitled thereto. As to her, it was not voluntarily paid into court.

In our opinion this case must come under the general principle that property which is held in the custody of the law is not liable to legal or equitable attachment. It is within the doctrine of *Tuck* v. *Manning*, 150 Mass. 211. As in that case, the fund is in the custody of the clerk of the court, and he must obey the orders of the Superior Court, to be made, not in this suit, but in the original action in which the money was paid into court. As in that case, the money was paid into court voluntarily by the persons who paid it, by the general owners of the drafts in that case in order to comply with the condition upon which they could obtain immediate possession of their drafts, by the insurance company here in order to relieve itself from the burden and expense of litigation in which it finally would have been defeated. Here, as in that case, the fund is in the hands of a court which is competent to deal with it and to dispose of it; and there is nothing in our statutes which expressly authorizes the maintenance of a bill like this or runs counter to the general rule as to property which is in the custody of the law. Here as in that case it has been judicially determined in the original case to whom the fund belongs, in that case to Manning, in this case to Mrs. Lowe. Here, as in that case, the bill was brought in the same court which had the general custody of the fund. Here, as in that case, the proceedings in which the money was paid into court were not brought by or for the creditors of the party now pursued. And finally, as in that case so in this, to permit a creditor to intercept the payment of the amount which has been found to be due to her is open to all the objections which were stated in that opinion. And see the cases there cited. The only substantial difference is that in that case it was a creditor of Manning who sought to reach the fund and who would have been bound only to prove that indebtedness, while here it is a creditor of Mrs. Lowe's husband, and so in a hearing on the merits he must prove not only the alleged indebtedness but also his right to subject to the payment of his demand

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property standing in the name of his debtor's wife. This plaintiff is distant one further remove from the fund which he wishes to reach than was the plaintiff in *Tuck* v. *Manning*. That cannot be made the ground of a distinction in his favor.

We find nothing in our own decisions at variance with our conclusion. Certainly the case of *Adamian* v. *Hassanoff*, 189 Mass. 194, is not so. That was decided by analogy to the case of successive attachments by the same officer of the same property in actions by different plaintiffs, R. L. c. 167, § 41, an analogy which does not exist here. Moreover that case differed both from *Tuck* v. *Manning*, *ubi supra*, and from the case at bar, in that the original actions in *Adamian* v. *Hassanoff* were instituted by and for creditors of the defendant, and the court had taken control of the fund for the benefit of such creditors.

It may be a question for the Legislature whether the rule should not be altered; but we feel bound by the decision in *Tuck* v. *Manning*, *ubi supra*.

The demurrers were rightly sustained, and the decree of the Superior Court dismissing the bill must be affirmed.

So ordered.

JOHN E. COTTER *vs.* NATHAN AND HURST COMPANY.

Suffolk. January 10, 1912. — January 15, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Appeal, Interlocutory order, Report. *Superior Court.*

Under R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4, providing for appeals from judgments of the Superior Court, no appeal can be taken before a final judgment.

The only way in which an interlocutory order or decision in an action at law can be brought before this court is by a report of a justice of the Supreme Judicial Court or of the Superior Court under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5.

TORT for an alleged malicious prosecution. Writ dated September 20, 1911.

The answer contained a general denial, and the treasurer of the

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defendant filed an affidavit under St. 1911, c. 305, stating that in his belief there was no merit in the action, whereupon the clerk of the Superior Court issued an order requiring the plaintiff to show cause why he should not become nonsuit. The defendant gave notice in writing to the plaintiff of such order, and the plaintiff failed to consent to a nonsuit and failed to file an affidavit setting forth the substantive facts upon which he relied. Thereupon the defendant moved that the case be advanced for speedy trial.

The motion was heard by *Hardy*, J., who denied the motion and made a memorandum of decision as follows:

"The plaintiff's counsel came into court at the time of hearing upon said motion and said that the action was upon a claim for malicious prosecution. He also stated that he intended to try the case, that he had a good case for trial. Upon the facts as stated by counsel I found that there was an intention to try the case. In my opinion I thought it was not best, in my discretion, to advance this case for speedy trial before cases that had been pending in court for a considerable time. I ruled as a matter of law that it was a question of discretion rather than a question of absolute duty on my part to advance the case, and I believed that I ought not to exercise my discretion in favor of advancing said case for speedy trial.

"I rule as a matter of law that the defendant, under all the circumstances in this case, has no right to have the case advanced for speedy trial, under the construction of the statute."

The defendant filed the following statement, called on the docket an appeal:

"Now comes the defendant in the above cause, and being aggrieved by the judgment of the court denying the defendant's motion to advance said cause for speedy trial, and by the ruling of the court thereon, being a matter of law apparent on the record in said proceeding, hereby appeals to the Supreme Judicial Court."

F. H. Stewart, A. P. Gay & A. S. Neal, for the defendant, submitted a brief.

C. H. Sprague, for the plaintiff, submitted the case without argument and without a brief.

RUGG, C. J. It is the settled rule of practice, frequently and uniformly maintained under R. L. c. 173, § 96, as amended by

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St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4, and under similar provisions of earlier statutes, that this court has no jurisdiction to consider an appeal until there has been a judgment. *Case* v. *Ladd*, 2 Allen, 130. *Bennett* v. *Clemence*, 3 Allen, 431. *Commonwealth* v. *Gloucester*, 110 Mass. 491, 497. *Marshall* v. *Merritt*, 13 Allen, 274. *Kellogg* v. *Kimball*, 122 Mass. 163. *O'Connell, petitioner*, 174 Mass. 253, 262. See *Brooks* v. *Shaw*, 197 Mass. 376.

The only way in which an interlocutory order or decision in an action at law can be brought to the consideration of the full court is by report of the justice presiding at the trial. R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5.

Appeal dismissed.

MARY L. HOWE *vs.* ALEXANDER GRIMES.

Middlesex. November 14, 1911. — January 18, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Bond, In bastardy process. *Bastardy.*

A bond given by the defendant in a bastardy process upon his release from arrest before the enactment of St. 1911, c. 53, amending R. L. c. 82, § 4, with a condition not only for the appearance of the defendant before the municipal court at the time "specified in said bond," as required by said § 4, but also for his appearance before that court on subsequent days to which the hearing might be continued, for which a separate bond then was required by § 6 of the same chapter, and with an additional condition that the defendant should abide the order of the municipal court, is not good as a statutory bond and consequently under R. L. c. 82, §§ 7, 15, is not security for the performance by the defendant of the order of the Superior Court in the case after its transmission to that court, although the bond is good as a common law obligation.

CONTRACT against the surety on a bond given by one Lincoln Young as principal and the defendant as surety in a bastardy process under R. L. c. 82, in which Young was arrested as the alleged father of the plaintiff's child and was released upon giving the bond in suit. Writ in the Police Court of Somerville dated November 20, 1908.

The condition of the bond sued upon was as follows: "Now, therefore, if the said principal shall appear and answer to said

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complaint at the said Municipal Court, as above required, on the 22nd day of August at nine o'clock in the forenoon and so from day to day and time to time until the final — and abide the — order of said court thereon, then this obligation shall be void otherwise it shall be and remain in full force and virtue."

On appeal to the Superior Court the case was tried before *Schofield*, J. The facts which appeared in evidence are stated in substance in the opinion.

At the close of the evidence the plaintiff asked the judge to instruct the jury "to assess her damages at $400 as the sum found due her in equity and good conscience, and for which execution should issue." The judge refused to give this instruction.

The plaintiff also asked the judge to rule "that the bond given in the case was security for the performance of the penal order of the Superior Court on April 10, 1908; that there was a breach of the condition of the bond upon the failure of the defendant to surrender himself or be surrendered by the surety, at the time of making such order."

The plaintiff also asked the judge to rule "that the personal appearance of said Lincoln Young at the final adjudication, when he was adjudged to be the father of the child and was ordered to stand charged with the payments specified in the order of the Superior Court on April 10, 1908, and to give a bond with sufficient sureties to perform that order, and that he stand committed until he should so give such bond — his personal appearance then and at that adjudication and his submission to commitment would have discharged the bond and this surety; and that his failure to so appear was a breach of the bond."

The judge refused to make the rulings requested. He ruled that, the condition of the bond being larger in scope than the condition provided for in § 4 of R. L. c. 82, the bond could not be considered a statutory bond, but was a common law bond, and that the defendant would be held according to the fair construction of the condition; that § 6 of R. L. c. 82 contemplated a different bond from that provided for in § 4; that a bond given under § 4 to secure the release of a defendant under arrest in a bastardy process could not be used as a bond under § 6 without the knowledge and assent of the surety; and that the bond sued upon, being a common law bond, could not make the surety liable for the per-

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formance of the order of the court under the provisions of § 15 of R. L. c. 82 as provided in § 7.

The judge further ruled that the provision in the condition of the bond, that the principal should abide the final "order of said court," referred to the final order of the municipal court, and that upon the record introduced in evidence a breach of the principal's common law obligation was shown in that he did not appear in the municipal court, but was defaulted, and that this default required that a verdict should be found for the plaintiff.

The judge concluded his rulings as follows: "The plaintiff does not contend that any actual damage can be shown by reason of the default of the respondent in the municipal court. The court therefore orders that damages for which execution shall issue shall be assessed in the nominal sum of one dollar." The jury returned a verdict in accordance with this order; and the plaintiff alleged exceptions. It was agreed by the parties that if the plaintiff's exceptions should be sustained, judgment might be entered for the penal sum of the bond, and execution might issue for $400 and taxable costs.

R. W. Gloag, for the plaintiff.

H. N. Allin, for the defendant.

DeCourcy, J. On August 20, 1906, one Lincoln Young was arrested on a warrant issued upon a bastardy complaint, and on August 21 was released from arrest after giving the bond in suit signed by the defendant as surety. The hearing in the municipal court was continued from time to time until November 12, when Young defaulted. The case was duly transmitted to the Superior Court, and on April 10, 1908, Young, not appearing, was adjudged to be the father of the plaintiff's child and was ordered to stand charged with the maintenance thereof.

The bastardy statute makes provision for two distinct bonds previous to that required when the defendant is bound over to the Superior Court. R. L. c. 82, § 4, authorizes his release from arrest upon giving a bond for his appearance before the municipal court "at a time to be specified in said bond." The statute of which this section is a re-enactment was passed in 1871 (St. 1871, c. 42, § 1; Pub. Sts. c. 85, § 4); and before that time the defendant presumably was compelled to remain in custody after his arrest until the time of his arraignment, as no means were

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provided in the statute for his release on bail. Rev. Sts. c. 49, § 1. Gen. Sts. c. 72, § 4.

As early as 1863 the Legislature authorized the local courts to continue from time to time the hearing of a bastardy complaint, and to take from the accused a bond for his appearance, "at any hearing of the complaint at any subsequent time to which the same may be continued, and from time to time until the final disposition of the complaint before the court or justice and not depart without leave." And this provision, with immaterial verbal changes, was re-enacted in Pub. Sts. c. 85, § 6, and now appears in R. L. c. 82, § 6.

The bond in the present action undertakes to secure the attendance of the accused not only on the day originally set for the hearing of the complaint, but also on subsequent days to which the hearing might be continued. There was no statutory authority for such a bond, embracing the conditions mentioned in both § 4 and § 6, until the present year, when St. 1911, c. 53, was enacted. And an additional condition in the present bond is that the accused shall abide the order of the municipal court, — a condition that is not provided for in either § 4 or § 6. Clearly the bond is not good as a statutory bond and consequently is not security for the performance by the accused of the order of the Superior Court. R. L. c. 82, §§ 7, 15.

The bond, however, is valid as a voluntary or common law bond. It is an agreement not prohibited by the statute nor contrary to public policy, and is founded upon a sufficient consideration. *Farr* v. *Rouillard*, 172 Mass. 303. The default of the accused in the municipal court constituted a breach of the defendant's common law obligation and entitles the plaintiff to at least nominal damages. The plaintiff has precluded us from considering whether she is entitled to substantial damages by the statement in her exceptions that "The plaintiff does not contend that any actual damage can be shown by reason of the default of the respondent in the municipal court."

Exceptions overruled.

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HOLLIS R. BAILEY, trustee, *vs.* CAROLINE A. WOOD & another.
SAME *vs.* MERCY L. WOOD.
SAME *vs.* SAME.

214-96
214-263
214-545
216-4

Suffolk. January 23, 1911. — February 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Bankruptcy. Trust. Frauds, Statute of. Merger. Mortgage.

A woman, who owned certain mortgages of real estate, was averse to making a will but wished that upon her death her property should go to her brother's wife and children. She knew that upon her dying intestate her brother would inherit her property as her only heir and next of kin and asked him, if he survived her, to distribute her estate among his wife and children. Her brother agreed to do this and relying upon his promise she refrained from making a will. Upon her death her brother, who then was insolvent, in performance of what he considered to be his duty and obligation distributed the whole of the estate to his wife and children, transferring the mortgages to a daughter as a part of her share. About a year and a half later he was adjudicated a bankrupt. The trustee in bankruptcy of his estate brought a suit in equity against the daughter to set aside the assignment of the mortgages. *Held*, that the oral trust, which had been executed in full, could be proved by oral evidence, even if it concerned land, and that, although the bankrupt was insolvent at the time he transferred the mortgages to the defendant, those transfers were made lawfully in the execution of a valid trust and withdrew from creditors no property to which the plaintiff as trustee in bankruptcy was entitled.

Where one, who holds the equity of redemption in certain real estate subject to a mortgage, inherits such mortgage as the sole heir and next of kin of its owner, but takes the mortgage with other property subject to an oral trust which he executes in full, and in accordance with the terms of that trust transfers the mortgage to the person equitably entitled to it, the existence of the trust prevents the extinguishment of the mortgage by merger.

THREE BILLS IN EQUITY, filed in the Superior Court on March 31, April 4 and June 16, 1908, by the trustee in bankruptcy of the estate of James A. Wood of Cambridge, the first against Caroline A. Wood, the wife of the bankrupt, and Mercy L. Wood, his daughter, and the other two against Mercy L. Wood alone, seeking to compel the assignment and conveyance to the plaintiff of certain property alleged to belong in equity to the estate of the bankrupt.

The cases were referred to Robert Cushman, Esquire, as master.

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He found the facts which are stated in the opinion and also the following facts:

James A. Wood filed a voluntary petition in bankruptcy on January 24, 1908, and thereupon was adjudicated a bankrupt, and on February 15, 1908, the plaintiff was appointed the trustee of his estate in bankruptcy.

The bill filed on March 31, 1908, related to certain real estate on Glendale Avenue in Somerville and to a mortgage thereon. On August 4, 1897, James A. Wood took a second mortgage for $750 on this property, subject to a first mortgage for $2,000. In August, 1898, the property was sold for taxes. On June 26, 1899, the first mortgage on the property was purchased by Sarah B. Wood, the sister of the plaintiff mentioned in the opinion, and was assigned to her. On March 28, 1900, the owner of the tax title conveyed that title to the defendant Caroline A. Wood. Shortly thereafter James A. Wood foreclosed his second mortgage and the purchaser at the foreclosure sale conveyed to him the title acquired by the foreclosure sale by a deed dated July 9, 1900. On August 6, 1902, Sarah B. Wood died intestate, leaving as her sole heir and next of kin James A. Wood, who on November 14, 1902, was appointed the administrator of her estate. On April 18, 1906, James A. Wood conveyed the first mortgage to the defendant Mercy L. Wood, the defendant Caroline A. Wood joining in the deed to release her dower. On the same day James A. Wood and his wife, the defendant Caroline A. Wood, in her right conveyed the property to Mercy L. Wood. On the same day James A. Wood, as administrator of the estate of Sarah B. Wood, executed to the defendant Mercy L. Wood a discharge of the first mortgage.

The bill filed on April 4, 1908, related to certain real estate on Broadway in Cambridge and a second mortgage thereon. On June 26, 1889, James B. Wood purchased this property and gave to the vendor a first mortgage for $4,500 to secure the payment of the purchase money. On March 7, 1901, he mortgaged the property to his sister Sarah B. Wood for $6,500, subject to the first mortgage. On the death of Sarah B. Wood on August 6, 1902, this second mortgage passed to James A. Wood as administrator of the estate of his sister, whose sole heir and next of kin he was. On September 11, 1906, James A. Wood transferred the second mortgage and note to the defendant Mercy L. Wood.

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The bill filed on June 16, 1908, related to a mortgage for $800 on certain real estate on Raymond Avenue in Somerville, which on March 14, 1896, was assigned by its holder to Sarah B. Wood, and on her death passed with the mortgage note to James A. Wood as the administrator of her estate. On May 28, 1906, as such administrator he assigned the mortgage and note to the defendant Mercy L. Wood.

James A. Wood failed and made a common law assignment in November, 1907, and filed a voluntary petition in bankruptcy in January, 1908, as stated above. Sprague and the Robinsons, mentioned below, were lumber producers in Maine.

In a supplemental report, filed after a recommittal of the case to him, the master made the following findings:

"I find that on April 18, 1906, the date of the first conveyance complained of, Wood's total liabilities amounted, as previously reported, to about $292,000. As stated in the first report, all but about $15,000 of this liability grew out of acceptances and indorsements for the benefit of Sprague and the Robinsons, which they ought to have paid. . . . I find that Wood's absolute liabilities, that is, his liabilities as to which he was not entitled to exoneration from anybody, amounted to about $66,000.

"With respect to the liabilities of $226,000 incurred for the benefit of others (Sprague and the Robinsons) as to which Wood was entitled to be exonerated, I find on all the evidence that the obligations of the parties bound to exonerate Wood were at the date in question good for their face value, and that there was no reasonable probability that Wood would ever be called upon to pay the same.

"As previously reported, Wood had about $75,000 of good quick assets and about $75,000 more of slow, but probably good assets. These were his assets outside of the property, the conveyance of which is complained of in these suits. At the date in question Wood also held promissory notes of the Robinsons, not indorsed nor discounted, amounting to about $13,000, which the Robinsons had sent him to be discounted, and which are not included in said assets.

"I find therefore on all the evidence that Wood was solvent at the date of the first conveyance complained of, namely, April 18, 1906.

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"I further find that, although the figures were changing somewhat from day to day, as drafts and notes were being retired and issued, and lumber was being received and sold, Wood's condition on the other two dates in question, to wit, May 28, 1906, and Sept. 11, 1906, was not materially different from that on April 18, 1906."

The cases were heard by *Pierce*, J., upon the plaintiff's exceptions to the master's report and supplemental report and a motion of the plaintiff again to recommit the cases to the master.

The judge made the following report of his rulings:

"It appeared by the master's report that he had excluded evidence as to the actual condition of solvency or insolvency of Sprague and the Robinsons, — the master's reason for such exclusion being that only what James A. Wood knew or ought reasonably to have known as to such facts was admissible.

"I was of the opinion and ruled against the defendants' objection that the master erred in excluding such testimony.

"I was also of the opinion and ruled against the defendants' objection that so far as this aspect of the case was concerned all the plaintiff's exceptions should be sustained and that the cases should be recommitted to the master with instructions to admit all further competent evidence offered by either party, and to make findings upon the following questions under the following directions, to wit: [Here followed five questions.]

"It appearing, however, by the master's report that all the property claimed by the plaintiff in cases numbered 5464 and 5637 [the second and third cases] came originally from Sarah B. Wood to James A. Wood, I was of the opinion and ruled against the plaintiff's objection that upon the facts found by the master no part of said property originally belonging to said Sarah B. Wood could be recovered by the plaintiff for the benefit of creditors.

"In case number 5451 [the first case], it appearing by the master's report that a part of the property claimed by the plaintiff came originally from Sarah B. Wood to James A. Wood, I was of the opinion and ruled against the plaintiff's objection that upon the facts found by the master no part of said property originally belonging to Sarah B. Wood could be recovered by the plaintiff for the benefit of creditors.

"As to the remaining portion of the property claimed by the plaintiff in case number 5451, I was of the opinion and ruled

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against the defendants' objection that there was no trust created and that the plaintiff was entitled to have the case recommitted to the master as aforesaid."

By agreement of the parties the judge reserved and reported the cases and all questions therein for determination by this court upon the pleadings, the master's original report, the plaintiff's exceptions thereto, the plaintiff's motion to recommit, the order of the court thereon, the master's supplemental report, the plaintiff's exceptions thereto, the plaintiff's motion to again recommit, and the rulings of the judge, such decree to be entered as equity and justice might require.

The cases were argued at the bar in January, 1911, before *Knowlton*, C. J., *Morton*, *Loring*, *Braley*, & *Rugg*, JJ., and afterwards were submitted on briefs to all the justices then constituting the court except *Loring*, J.

H. R. Bailey, (*A. L. Millan* with him,) for the plaintiff.

G. W. Anderson, (*F. M. Whitman* with him,) for the defendants.

BRALEY, J. The trustee in bankruptcy of James A. Wood brings these suits against Caroline A. Wood and Mercy L. Wood, who are respectively the wife and daughter of the bankrupt, to set aside certain conveyances alleged to have been fraudulently made by him to Mercy L. Wood of his interest in three parcels of real property, and for such further relief as may be necessary to vest the title in the plaintiff. By the statute the assignment conveyed the property of the bankrupt, and, although the conveyances in question were made nearly two years before the date of bankruptcy, the plaintiff was clothed with the rights of creditors to reach as assets of the estate property fraudulently conveyed at common law. U. S. St. 1898, c. 541, § 70. *Knowlton* v. *Moseley*, 105 Mass. 136.

The mortgages which were assigned by the conveyances were found by the master to have been at her death the sole property of Sarah B. Wood, a sister of the bankrupt, who was her only heir at law and upon her decease was duly appointed administrator of her estate. If through inheritance he took the property charged with a trust, and the conveyances were in performance of the trust, and for no other purpose, it could not have been seized by creditors, and the plaintiff has not succeeded to any enforceable interest. *Sibley* v. *Quinsigamond National Bank*,

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133 Mass. 515, 522, 523. *Low* v. *Welch*, 139 Mass. 33. *Stratton* v. *Edwards*, 174 Mass. 374. *Emery* v. *Boston Terminal Co.* 178 Mass. 172, 184. *King* v. *Cram*, 185 Mass. 103, 104.

It is important to a clear understanding of the nature of the bankrupt's title to refer to the master's explicit findings, to which on this question no exceptions were taken. Sarah B. Wood for many years was a member of his household, and during the four or five years immediately preceding her death frequently expressed to him a desire that whatever property she might leave should go to his wife and two children. But, being an invalid, she could not anticipate how much of her savings might be required for her comfortable support, and for this reason was averse to making a testamentary disposition of the estate, while she fully realized that upon intestacy he would come into possession as her heir. It was during these interviews that she requested him to distribute the estate between his wife and children in such proportions as in his discretion he deemed advisable. The master's conclusions, that a definite understanding and agreement were reached that she should not make a will, but that the property was to pass by descent to be distributed between his wife and children, and that she refrained from making a will in their favor, relying upon his assurance that, if he survived, distribution would be made as she had requested, are decisive as to the facts. The intention of the parties, that when received the property was to be disposed of in a particular way and for the sole benefit of those who had been designated as beneficiaries, being manifest, no precise form of words was necessary to create a trust, and the terms "trust" and "trustee" were unessential. *Packard* v. *Old Colony Railroad*, 168 Mass. 92. *Sawyer* v. *Cook*, 188 Mass. 163, 165. Nor was it necessary to inform the beneficiaries that a trust existed in their favor, as they would have been clothed with the equitable, when he became vested with the legal title. *Woodward* v. *James*, 115 N. Y. 346, 356. *Fletcher* v. *Fletcher*, 4 Hare, 67, 74. It has been held under R. L. c. 74, § 1, cl. 4, and c. 147, § 1, that an express trust concerning land, if executory, must be evidenced by an instrument in writing, or it cannot be enforced. *Tourtillotte* v. *Tourtillotte*, 205 Mass. 547. *Kennerson* v. *Nash*, 208 Mass. 393. And if the oral agreement had been reduced to writing and signed by the parties, or if at her death he had executed and recorded a

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proper declaration, an effectual trust would have been established against all persons claiming under him. *Urann* v. *Coates*, 109 Mass. 581, 585. *Blodgett* v. *Hildreth*, 103 Mass. 484, 486. *Holmes* v. *Winchester*, 135 Mass. 299, 305. *Barrell* v. *Joy*, 16 Mass. 221. *Silvers* v. *Potter*, 3 Dick. 539. *Gardner* v. *Rowe*, 2 Sim. & Stu. 346; *S. C.* 5 Russ. 258. But, having come into a court of equity for redress, the plaintiff must recognize the equitable rights of the defendants which are to be ascertained as of the date of bankruptcy. The agreement was entered into in good faith. It was not illegal or a mere nullity. It could be proved by parol evidence; and in reliance on its terms Sarah B. Wood died intestate. *Cahill* v. *Bigelow*, 18 Pick. 369, 372. *Coughlin* v. *Knowles*, 7 Met. 57. *Potter* v. *Kimball*, 186 Mass. 120. The master reports that James A. Wood considered himself bound to distribute the property thus inherited as his sister had requested and he had promised; and that in performance of what he considered to be his plain duty, and without any intent to hinder, delay or defraud creditors, distribution of the entire estate was made between his wife and children, including the portion conveyed to Mercy L. Wood. See *Haigh* v. *Kaye*, L. R. 7 Ch. 469. It was said by this court speaking through Chief Justice Gray in *Olliffe* v. *Wells*, 130 Mass. 221, 225, that "where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased." The transaction may be none the less fraudulent in a court of equity, where the sole heir at law induces the ancestor to die intestate, honestly intending at the time to comply with his requests as to the distribution of the estate, but upon receiving the inheritance changes his mind, and in disregard of his express promise deliberately appropriates the property to his own use. *Jones* v. *Bradley*, L. R. 3 Ch. 362, 363, 364. *McCormick* v. *Grogan*, L. R. 4 H. L. 82, 88, 97. *French* v. *French*, [1902] 1 I. R. 172, 187, 224, 225. The statute of frauds and the statute of wills have been held not to bar relief in cases springing from the perpetration of fraud. *Potter* v. *Kimball*, 186 Mass. 120. *Young* v. *Peachy*, 2 Atk. 254. *Rolfe* v. *Gregory*, 4 DeG., J. & S. 576, 579. *Jones* v. *Bradley*, L. R. 3 Ch. 362, 363, 364. But we need not consider whether the fiduciary relations were such that a constructive trust

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existed, which the defendants could have enforced if Wood had acted unconscientiously. Nor is it of importance what effect, if any, the doctrine of the common law which prevails in this Commonwealth, that the mortgagee as between himself and the mortgagor is seised in fee of the premises, would have upon an executory agreement resting in parol for the transfer of the interest of the mortgagee. *Ewer* v. *Hobbs*, 5 Met. 1, 3. *Ayres* v. *Waite*, 10 Cush. 72, 74. *Adams* v. *Parker*, 12 Gray, 53. Or whether, the mortgages having been in equity merely security for the payment of the mortgage debts in which an express trust, notwithstanding the provisions of R. L. c. 147, § 1, could be created by parol, James A. Wood, who as administrator was vested under R. L. c. 150, § 7, with the legal title of the mortgagee as personal property, held it subject to the trust. *Sturtevant* v. *Jaques*, 14 Allen, 523, 527. *Childs* v. *Jordan*, 106 Mass. 321. *Thacher* v. *Churchill*, 118 Mass. 108, 109. *Currier* v. *Studley*, 159 Mass. 17, 29. *Potter* v. *Kimball*, 186 Mass. 120. *Look* v. *Kenny*, 128 Mass. 284, 286. 1 Perry on Trusts, (4th ed.) § 86. And the defendant Mercy L. Wood, having the equitable title to the mortgage debts, could have compelled their transfer with an assignment of the mortgages. *Barnes* v. *Boardman*, 149 Mass. 106, 114. The parol trust or agreement, having been fully executed, was unaffected by the statute of frauds, which cannot be invoked to defeat the estate conveyed. *Stone* v. *Dennison*, 13 Pick. 1, 4, 5. *Coughlin* v. *Knowles*, 7 Met. 57. *Bush* v. *Boutelle*, 156 Mass. 167, 170. *Blackwell* v. *Blackwell*, 196 Mass. 186, 190. *Tillinghast* v. *Coggeshall*, 7 R. I. 383, 393. *Robbins* v. *Robbins*, 89 N. Y. 251. *Silvers* v. *Potter*, 3 Dick. 539. *Janes* v. *Falk*, 5 Dick. 468. *Sackett* v. *Spencer*, 65 Penn. St. 89, 99. *First National Bank of Appleton* v. *Bertschy*, 52 Wis. 438, 454, 455. *McCormick Harvesting Machine Co.* v. *Griffin*, 116 Iowa, 397. *Neves* v. *Scott*, 9 How. 196. *Bowen* v. *Chase*, 94 U. S. 812, 818. *Gardner* v. *Rowe*, 2 Sim. & Stu. 346; *S. C.* 5 Russ. 258. *Milroy* v. *Lord*, 4 DeG., F. & J. 264, 274.

We cannot accede to the further contention of the plaintiff, that if Wood was insolvent the conveyances necessarily must be treated as fraudulent. The bankrupt's insolvency at the date of the transfers must be determined from all his indebtedness, both primary and contingent, and from the very full statements in the master's report we have no doubt that he was unable to meet

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his outstanding financial obligations as they might mature in the ordinary course of business. *Chipman* v. *McClellan*, 159 Mass. 363, 368, 369. A conveyance, however, by an insolvent debtor without any valuable consideration moving from the transferee, may or may not be fraudulent. It is primarily a question of fact as was said in *Matthews* v. *Thompson*, 186 Mass. 14, 22, 23, where many of our cases are collected and reviewed. See also *Lerow* v. *Wilmarth*, 9 Allen, 382, 386; *Draper* v. *Buggee*, 133 Mass. 258, 262; and *Anderson* v. *Metropolitan Stock Exchange*, 191 Mass. 117, 121. In the case of *Deshon* v. *Wood*, 148 Mass. 132, on which the plaintiff places much reliance, the insolvent debtor made and carried out a marriage settlement with intent to defraud his creditors, and the transaction was set aside by a majority of the court, although the wife did not participate in the fraud. The transfers of the mortgages in controversy were not in payment of antecedent debts or to withdraw assets from the reach of creditors; nor were they intended as conveyances of the bankrupt's estate, but to convey only the legal title to property which now must be treated as having been held under a valid trust and conveyed lawfully prior to bankruptcy in execution of the trust. *Stratton* v. *Edwards*, 174 Mass. 374, 378. *Sackett* v. *Spenser*, 65 Penn. St. 89, 99.

In the last two suits at bar it appears that all the property transmitted came originally from Sarah B. Wood, and the plaintiff's exceptions to the master's report having become immaterial by our decision, they must be overruled, and the bills severally dismissed with costs.

But in the first suit, while the first mortgage was properly assigned to the defendant Mercy L. Wood, the conveyance to her of the equity of redemption was not in execution of the trust. The effect of the sale for non-payment of taxes upon this title need not be considered, as the conveyance of the tax title to the defendant Caroline A. Wood before the period of redemption expired, the master apparently finds, was only to protect the outstanding mortgages, which would have been extinguished if the tax title had been permitted to ripen. *Abbott* v. *Frost*, 185 Mass. 398. By the foreclosure of the second mortgage James A. Wood therefore acquired title to the equity of redemption, and, Caroline A. Wood not having retained any adverse interest, the bill as to her must be dismissed with costs. It is sufficiently plain that by reason of the

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trust there was no merger of the respective titles in James A. Wood, when having acquired the equity he succeeded to the rights of the first mortgagee by inheritance. *Evans* v. *Kimball*, 1 Allen, 240. The master's report contains no reference to the circumstances under which the estate acquired by the foreclosure was deeded by him to Mercy, whose rights if this deed is set aside to have the first mortgage which has not been paid decreed to be an existing incumbrance notwithstanding the discharge by James A. Wood as administrator, can be fully protected in the adjustment in the Superior Court of the equities between the parties. *Crosby* v. *Taylor*, 15 Gray, 64. *Tucker* v. *Crowley*, 127 Mass. 400, 401. It will be incumbent on that court to ascertain the circumstances and to determine whether she holds the estate otherwise than in mortgage, by a title which is valid against the plaintiff. *Lerow* v. *Wilmarth*, 9 Allen, 382, 386. *Draper* v. *Buggee*, 133 Mass. 258, 262.

Decree in each case accordingly.

SARAH A. BARRON *vs.* INHABITANTS OF WATERTOWN.

Middlesex. November 16, 17, 1911. — February 26, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Way, Public: defect, prescription, damages. *Damages*, In tort.

If a traveller falls and is injured by reason of stepping on the inside edge of a concrete sidewalk of a public way of a town, at a place where such edge is about three inches higher than the surface of the adjoining private land and is ragged, rough and broken off, and this condition has been known for a long time to the officers of the town, a jury, who have taken a view of the premises which have remained unchanged since the time of the accident, can find that the injuries were caused by a defect in the way for which the town was liable.

If the edge of a sidewalk of a public way of a town, which extends one inch beyond the limits of the way, has been wrought and maintained by the town and used by the public as a portion of the travelled part of the way for more than twenty years, the town is bound to keep it in repair.

In an action against a town under R. L. c. 51, § 18, for personal injuries alleged to have been caused by a defect in a public way of the defendant, the plaintiff, if he proves the liability of the defendant, can recover as a part of his damages the amount of a reasonable bill paid by him for medical services required as a direct result of his bodily injury.

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TORT under R. L. c. 51, § 18, for injuries sustained by the plaintiff from an alleged defect in a concrete sidewalk alleged to be a part of Mount Auburn Street, a public way of the defendant, while the plaintiff was walking along the sidewalk at about ten o'clock on the evening of February 10, 1910. Writ dated September 16, 1910.

In the Superior Court the case was tried before *McLaughlin*, J. It appeared that the plaintiff stepped on the edge of the concrete, which was about three inches above the gravel surface of the adjoining private land, and fell, breaking her ankle. The chairman of the board of selectmen of the defendant testified that there had been no change whatever in the edge of the sidewalk for a great many years and "that that condition" had "existed for a great many years since the town built that tar concrete walk there." On cross-examination by the plaintiff, he testified that he thought the town first laid a concrete walk there about 1874. Another witness, a former selectmen of the defendant, testified that there had been no change in the sidewalk, that he was forty years old and always had lived in Watertown and that "as far back as he could remember the sidewalk was then there." Another witness, who was forty-two years old and had lived in Watertown all his life, testified, "That as to the edge of the sidewalk being rough and jagged, it is about the same as it has always been, about the way they leave an unfinished concrete sidewalk." The town engineer of the defendant testified that at the place of the accident the inside line of the sidewalk extended beyond the street line about one inch. Other facts are stated in the opinion.

The defendant asked the judge to make the following rulings:

"3. There is no evidence that, at the time of the alleged injury, there was a condition amounting to a defect in the sidewalk for which the defendant can be held liable."

"5. On the whole evidence, the plaintiff is not entitled to maintain this action."

The judge refused to make either of these rulings, and the defendant excepted.

The bill contained the following:

"The defendant also excepted to that portion of the charge which charged, in substance, that the jury would be warranted in finding a verdict for the plaintiff, if they find the conditions as

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testified to by the plaintiff's witnesses existed at the time of the accident, which exception was allowed.

"The defendant also excepted to that portion of the charge that instructed the jury, in substance, that if the concrete extended for an inch, or thereabouts, over the street line on to the land of Kelley, and if they should find that the public had used that portion openly and publicly and adversely for twenty years prior to the accident, and should find that the defect in question existed upon that portion of the sidewalk, then the town would be liable to keep that portion in a condition safe and convenient for travellers and was liable for any defect in that portion of the sidewalk.

"The defendant excepted to that portion of the charge that, in substance, instructed the jury that in case they found for the plaintiff, they should include, in any damages they might find she was entitled to, a fair amount for physicians' bills."

The jury returned a verdict for the plaintiff in the sum of $1,100, including the physician's bill, which they found and stated to be $50. The defendant alleged exceptions.

W. A. Abbott, for the defendant.

L. G. Blair, for the plaintiff.

DeCourcy, J. There was but meagre evidence that the public way at the place of the accident was not reasonably safe for travel; but we cannot say, as matter of law, that there was not sufficient evidence of a defect to be submitted to the jury. Mount Auburn Street in the neighborhood of the accident was apparently a much frequented business thoroughfare. The plan in evidence shows that about one and one half feet beyond the spot where the plaintiff fell the sidewalk turns at a right angle from the street line and runs back a distance of several feet to a store. The path made by a snow-plow overlapped the inner line of the sidewalk near the place of the accident from six to eight inches, thus bringing the edge of the concrete walk well within the path for foot travellers. There was testimony that the sidewalk at the place where the plaintiff fell was very ragged, rough and broken off, and that it appeared like an unfinished concrete sidewalk. This condition presumably was not due to ordinary wear but to water thrown from a spout near by, and to the frequent crossing of the concrete walk by teams going to and from the adjoining stable yard of one Kelley, which was about three inches below the street level. The jury

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viewed the premises, which had not been changed since the time of the accident. On the whole we think that the issue of a defect was one for the jury. *Gallagher* v. *Watertown*, 197 Mass. 467. *Howe* v. *Marlborough*, 204 Mass. 26.

The defendant contended that the concrete walk at the place of the accident extended about one inch beyond the limits of the street. But it was undisputed that the portion of the sidewalk where the alleged defect existed had been used by the public and had been wrought and maintained by the town since 1874 as a portion of the travelled part of Mount Auburn Street. Accordingly the town was bound to keep it in repair. *Moran* v. *Palmer*, 162 Mass. 196. *Tilton* v. *Wenham*, 172 Mass. 407. *Bassett* v. *Harwich*, 180 Mass. 585.

That the alleged defect was the cause of the accident is not questioned by the defendant. Whether reasonable supervision by the officers of the town who were charged with the care of the street would have disclosed, and whether reasonable diligence on their part would have remedied, the unsafe condition, as well as the issue of the plaintiff's due care, were all questions of fact upon the evidence. The case was submitted to the jury with instructions that were apt, full and clear, and we discover no error therein.

The plaintiff was rightly allowed to recover the amount she paid for medical services. Under our statute creating municipal liability for defects in highways damages are given only for direct injury to the person and to property. *Raymond* v. *Haverhill*, 168 Mass. 382. But when the plaintiff sustained such direct bodily injury she became entitled to compensatory damages, including the expenses reasonably incurred in consequence thereof for medical treatment. *Johnson* v. *Holyoke*, 105 Mass. 80. *Allen* v. *Boston*, 159 Mass. 324. This is not a claim based upon consequential injuries sustained by one person as the result of a direct harm done to another, such as a husband may suffer following an accident to his wife, or a father as the result of an injury to his minor son. See *Harwood* v. *Lowell*, 4 Cush. 310; *Nestor* v. *Fall River*, 183 Mass. 265.

Exceptions overruled.

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COMMONWEALTH *vs.* MORRIS ROSENTHAL.

Middlesex. November 20, 1911. — February 26, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Criminal, Trial for two offenses.

A trial judge in his discretion may require that a defendant, against his objection, shall be tried at one time upon two indictments, one under R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1, charging him with enticing away a certain girl on a certain day for the purpose of unlawful sexual intercourse, and the other under R. L. c. 212, § 10, charging him with committing adultery with the same girl at the same place on the same day.

The rule of *Commonwealth* v. *Bickum*, 153 Mass. 386, that a defendant, against his objection, cannot be tried at one time upon two separate complaints charging two distinct crimes committed at different times, is not to be extended.

TWO INDICTMENTS, each in two counts, found and returned in March, 1911, one under R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1, for abduction and the other under R. L. c. 212, § 10, for adultery.

The first indictment in the first count charged that the defendant on January 23, 1911, at Malden did fraudulently and deceitfully entice and take away one Esther E. Anderson, a girl between seventeen and nineteen years of age, from her place of abode in Boston for the purpose of unlawful sexual intercourse with her in a house on a certain street in Malden in a room hired by the defendant for that purpose. The second count made the same charges against the defendant in regard to one Clementine Charland.

The second indictment in the first count charged that the defendant, a married man, on January 23, 1911, at Malden did commit adultery with one Esther E. Anderson. The second count made the same charge against the defendant in regard to one Clementine Charland.

In the Superior Court the cases were tried before *Dana*, J. When the cases were called for trial, the district attorney proposed to try the defendant upon both indictments together. The defendant promptly objected to such a trial and insisted upon his right to be tried separately upon each indictment, denying the right of the court to try him upon both indictments together.

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The judge ruled that he had discretionary power to order a trial of the defendant upon both indictments at one time, and ordered such a trial. The defendant excepted.

Thereupon the defendant was tried upon both indictments at the same time. The jury acquitted him upon both counts of the indictment charging him with abduction, and returned a verdict of guilty upon both counts of the indictment charging him with adultery. The defendant alleged exceptions, presenting only the question stated above.

E. Greenhood, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth, submitted a brief.

RUGG, C. J. It is well settled that a defendant may be charged with divers and distinct offenses, whether felonies or misdemeanors, of a kindred nature, and liable to punishments of the same general character, by several counts in the same indictment or complaint. *Commonwealth* v. *Mullen*, 150 Mass. 394. *Castro* v. *The Queen*, 6 App. Cas. 229. It has been decided also that two persons separately indicted for the same offense may be tried together. *Commonwealth* v. *Seeley*, 167 Mass. 163. It was held in *Commonwealth* v. *Bickum*, 153 Mass. 386, that a defendant against his objection could not be tried at one time upon two separate complaints charging two distinct crimes committed at different times. To this same effect see *McClellan* v. *State*, 32 Ark. 609. None of these decisions quite reach the point presented by the case at bar. Broadly stated, that point is whether two indictments founded upon substantially one transaction provable largely by the same evidence can be tried together against one defendant. Concretely, it is whether a defendant against his protest may be tried at one time upon two separate indictments, one charging abduction of a girl between seventeen and nineteen years of age, for the purpose of unlawful sexual intercourse (R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1) and the other charging adultery with the same girl. Each of the offenses named is a felony, being punishable by imprisonment in the State prison. R. L. c. 215, § 1. The general nature of the two offenses is the same, namely, unlawful sexual relations. The enticing away of the girl from home or elsewhere by a married man is but a preliminary step in the accomplishment of the ultimate design. The evidence which

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would support the two charges would be similar in character. The mode of trial is the same. The circumstances that the statute of limitations is less as to abduction and a greater burden of evidence is required for conviction of it (R. L. c. 212, § 7) do not differentiate the two crimes in that respect. Nor do the facts that an unmarried man might be found guilty of one offense while only a married man could commit the other upon the allegation of the indictment, or that an element of fraud might enter into one and not into the other crime constitute vital differences. The two offenses might have been joined by several counts on one indictment. In the case at bar the offense, whatever it might be found to be, grew out of the same acts. The same evidence would be required in substance to prove each crime, although less would suffice to convict of one than the other. Where the essential elements of the conduct which may constitute two distinct crimes are the same and to be proved in large part by the same evidence, and where the indictment might have been drawn legally so as to include both crimes, no right of the defendant secured to him by the law as matter of right is violated by compelling a joint trial of both indictments in the exercise of a sound judicial discretion.

The rule of *Commonwealth* v. *Bickum*, 153 Mass. 386, does not prevail generally. *State* v. *Johnson*, 50 N. C. 221, *State* v. *Watts*, 82 N. C. 656, and *Withers* v. *Commonwealth*, 5 Serg. & R. 59, are referred to in that opinion. See also *State* v. *Lee*, 114 N. C. 844. The contrary practice is established by statute in some jurisdictions. *Williams* v. *United States*, 168 U. S. 382, 390. *Short* v. *People*, 27 Col. 175. In *Logan* v. *United States*, 144 U. S. 263, decided after *Commonwealth* v. *Bickum*, it was said by Mr. Justice Gray, at 296, that different indictments "might perhaps have been ordered, in the discretion of the court, to be tried together, independently of any statute upon the subject. See *Ex parte Yarbrough*, 110 U. S. 651, 655; *United States* v. *Marchant*, 12 Wheat. 480." In *Brown* v. *United States*, 74 C. C. A. 214, 220, 221, it was said by Judge Van Devanter that the indictments "were merely tried together as separate indictments to avoid unnecessary delay and expense, in the interest of both the government and the defendants. . . . The court was invested with a discretion to direct that the indictments be thus tried together independently of any statute upon the subject." In *Cummins* v. *People*, 4 Col.

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App. 71, 74, it was said that a statute authorizing the trial at the same time of two or more indictments charging connected or kindred offenses was "but an embodiment of a well established principle of the common law." See also *People* v. *Jacobson*, 247 Ill. 394, 397.

The logic of *Commonwealth* v. *Bickum*, 153 Mass. 386, did not obtain in *Commonwealth* v. *Miller*, 150 Mass. 69, where two, jointly complained of in the district court in two counts with having received different stolen goods at different times, one being found guilty on both counts and the other acquitted on the first and found guilty on the second count, on the appeal of both separate trials were refused in the Superior Court, although the result was that two defendants were tried together, one charged with two distinct offenses and the other with one offense only. An inexorable application of the logic of *Commonwealth* v. *Bickum*, 153 Mass. 386, might include this case. But this court has refused to approve its logic in cases where substantial justice does not require it, and where no substantive right of a defendant has been invaded. In *Commonwealth* v. *Seeley*, 167 Mass. 163, although no precedent therefor was found, it was held that two persons separately indicted for an offense committed jointly might be tried together. The incident under inquiry was made there the basis of trial rather than the number of indictments. That principle is controlling in the present case, where the indictments were founded upon what was in substance a single criminal course of conduct.

Without impairing the authority of *Commonwealth* v. *Bickum* as to cases exactly covered by it, we are not inclined to extend its doctrine. Not infrequently it may be uncertain at the time of action by the grand jury precisely what crime a defendant has committed. Larceny, embezzlement, and obtaining property by false pretenses are closely interwoven, and the distinctions between them not infrequently involve extreme technicality. Before the adoption of the act simplifying criminal pleading, miscarriages of justice have resulted from mistakes in perceiving the differences between them. See *Commonwealth* v. *King*, 202 Mass. 379, 388; *Commonwealth* v. *Althause*, 207 Mass. 32, 46. Some difficulties in this regard perhaps may survive. Other illustrations might be given to show the perplexity of determining in advance of trial the exact crime which the evidence may prove, although acts

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committed may be reasonably certain. No sound reason can be given why several indictments charging different crimes arising out of a single chain of circumstances should not be tried together. Where several offenses might have been joined in one indictment, and would be proved by substantially the same evidence, or evidence connected with a single line of conduct, and grow out of what is essentially one transaction, and where it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial, simply because separate indictments had been found for each offense. The interests of the public and the rights of the defendant will be better subserved in general by permitting as matter of law a single trial under such conditions, leaving it to the sound discretion of the trial court to order separate trials when the rights of either the Commonwealth or of the defendant appear to require it. There is nothing in the case at bar to indicate that such discretion was not exercised wisely. All the justices are agreed in this result but a minority prefer to reach it by overruling *Commonwealth* v. *Bickum*, 153 Mass. 386.

Exceptions overruled.

MARCIANO GRELLA, administrator, *vs.* LEWIS WHARF COMPANY.

SAME *v.* SAME.

MARCIANO GRELLA *v.* SAME.

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212 - 399
216 - 586

Suffolk. November 20, 21, 1911. — February 26, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Imputed, Causing death. *Corporation*, Powers. *Lewis Wharf Company*. *Evidence*, Presumptions and burden of proof.

In an action against the owner of a tenement building for causing the death of a child fourteen months old, who fell through an opening in the balustrade of a hallway on the second floor of the building, there was evidence that the mother of the child, who occupied a tenement on the second floor, had another child less than two months old and was compelled to do all the family housework and attend to her two children, that she entrusted the older child to the daughter of another tenant fifteen years of age, who had taken care of the child on other occasions, that the child then was on the floor of the hallway where two older children were playing with it, that this girl took up the child in her arms and

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walked with it and later, being obliged to do her housework, put the child down on the floor apparently some feet distant from the opening in the balustrade, and when she had taken three steps heard it fall, that the mother, when she went from the hallway into her own tenement adjoining it, had seen the child in the girl's arms and within two or three minutes heard the noise of the fall. *Held*, that, if the girl was the custodian of the child at the time of the accident, the question of her due care was for the jury, and if, as might be found, the mother was the custodian, her due care also was a question for the jury, who could find that the oversight she gave the child was all that reasonably could be required of her under the circumstances.

The Lewis Wharf Company, created by St. 1834, c. 115, and authorized within the limits described in that act to "erect buildings, lay out streets and passage ways, and improve and manage said property, as to them shall seem expedient," has power to maintain a tenement house within the designated territory, and in doing so is subject to the liability for causing death by negligence imposed by R. L. c. 171, § 2, as amended by St. 1907, c. 375.

Review by DeCourcy, J., of the statutes of this Commonwealth providing a civil remedy for death caused by negligence.

Illustrations given by DeCourcy, J., of cases where the rule of evidence requiring proof beyond a reasonable doubt in criminal proceedings does not apply to civil actions which are penal in their nature.

In an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing death by negligence, the plaintiff sustains the burden of proof by proving his case by a preponderance of the evidence.

THREE ACTIONS OF TORT, the first by Marciano Grella as administrator of the estate of his child Margherita Grella, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a girl fourteen months old, by negligently failing to keep in repair a balustrade or railing on the second floor of a tenement building of the defendant numbered 259 on North Street in Boston, the second action, brought also as administrator, to recover for conscious suffering of the plaintiff's intestate, and the third action by the plaintiff personally for expenses incurred by reason of the injury and death. Writs dated July 17, 1908.

In the Superior Court the cases were tried together before *Harris*, J. The accident happened on June 23, 1908, at about 6.30 P. M. and the child died four hours later. The plaintiff and his family, consisting at the time of the accident of his wife and two babies, one a month old and the plaintiff's intestate fourteen months old, occupied three rooms on the second floor of the tenement opening upon the hallway on that floor.

The defendant was a corporation, created by St. 1834, c. 115. The building in question was not physically connected with the

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wharf of the defendant. It consisted of a store on the ground floor and tenements on the second, third and fourth floors. There was a hallway off North Street with a stairway leading to the second floor, then a passage or hallway at the right extending to a window on North Street, which window was at the foot of a stairway leading to the third floor. As one went up the first stairway there was a railing or balustrade and this turned and was on the right hand side of the passage or hallway of the second floor. The balustrade consisted of ordinary wooden banisters.

At the time of the accident the plaintiff's intestate was in this hallway on the second floor, where two or three children were playing, "and somehow she fell where the banisters were broken out and landed at the foot of the stairs on the floor below and near the doorway entering the tenement portion of the building."

The other facts material to the questions raised by the exceptions are stated in the opinion.

At the close of the evidence the defendant asked the judge to give the following instructions:

"1. Upon all the evidence in the case the plaintiff cannot recover.

"2. R. L. c. 171, § 2, as amended by St. 1907, c. 375, does not apply to this case, and therefore the plaintiff cannot recover.

"3. You must be satisfied beyond a reasonable doubt that the mother of the child was in the exercise of due care."

The judge refused to give any of these instructions.

The jury returned a verdict for the plaintiff in each of the cases; and the defendant alleged exceptions, which, after the resignation of *Harris*, J., were allowed by *Jenney*, J.

J. Lowell & J. A. Lowell, for the defendant.

J. L. Hall, (*E. S. Kochersperger* with him,) for the plaintiff.

DeCourcy, J. The deceased, a child fourteen months old, fell through an opening caused by broken banisters in a tenement house of the defendant, and struck on the floor below. These actions are brought, one for her death, one for her conscious suffering, and the third for the medical and funeral expenses.

1. The defendant's first request, that upon all the evidence the plaintiff cannot recover, was rightly refused. The defendant was the landlord of the plaintiff Marciano Grella and retained control of the common hallway where the accident happened. This opening in the balustrade was made after the tenancy began,

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had remained unguarded for two or three months before the accident, had been called to the attention of the defendant's agent and could have been repaired at a trifling expense. That this constituted sufficient evidence of negligence is not questioned by the defendant. *Faxon* v. *Butler*, 206 Mass. 500.

But it is urged that the plaintiff has not sustained the burden of showing due care. The deceased was a child of such tender years that she was incapable of exercising care, and this issue must be determined by the conduct of those in charge of her. The mother testified that she entrusted the child to the custody of Angelina Cardarelli, the fifteen year old daughter of a neighboring tenant, who had taken care of the little one on other occasions; and the case apparently was tried on the assumption that Angelina's due care must be shown. *Norris* v. *Anthony*, 193 Mass. 225.

The accident happened on a hot summer evening. Two other children, aged seven and six years, were playing with the baby in the corridor when Angelina took it up in her arms and walked with it. Later, being obliged to do her housework, she put the little one down on the floor at a place about opposite to the middle of the balustrade and apparently some feet distant from the opening mentioned. When she had taken three steps from where she left the child she heard it fall and turned back to see what was the trouble. Although the question of Angelina's due care is somewhat close on this evidence, under all the circumstances it was rightly submitted to the jury.

The same result is reached if the mother was the custodian at the time of the accident, as might be found upon Angelina's testimony. When she stepped from the corridor into her own apartment she saw her child in Angelina's arms, and within two or three minutes she heard the noise of the fall. We must take into consideration the fact that this woman was compelled to do all the family housework and attend to her two children, the younger of whom was less than two months old. She might well assume that Angelina, who was accustomed to the care of children and whose little brother was in the corridor, would not leave the baby on the floor but would call out for or return it to its mother. The jury might well find that the oversight this mother gave to her child was all that reasonably could be required of her under

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the circumstances disclosed. *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37, and cases cited.

2. The remaining exceptions apply only to the action under the death statute (St. 1907, c. 375). The second request raises the question whether the death of the child was caused by this corporation "by . . . its negligence, or by the negligence of . . . its agents or servants while engaged in . . . its business." The contention of the defendant is that its business was that of wharfinger, and not that of owning and renting tenement houses; and that the statute does not apply to it. This contention is sufficiently answered by the defendant's act of incorporation, St. 1834, c. 115, which in terms empowered it, within limits which include the place of the accident, to "erect buildings, lay out streets and passageways, and improve and manage said property, as to them shall seem expedient." It may well be that its main business was in connection with its piers and the warehouses and stores thereon. But the maintenance of the tenement house at 259 North Street and the receipt of its rentals was at least incidental to the business of this corporation which owned a number of tenement houses in the vicinity of the piers and had about sixty tenants. *Daley* v. *Boston & Albany Railroad*, 147 Mass. 101.

3. The judge was right in refusing to give the third request that the mother's due care in the death case must be proved beyond a reasonable doubt. The history of our statutes authorizing recovery for death caused by negligence was thoroughly reviewed in the recent cases of *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, and *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, but the question now raised was not discussed. The only remedy provided in death cases was by indictment until St. 1881, c. 199, first introduced a civil action in cases against common carriers and towns. When the statutes were revised in the Public Statutes of 1882, the indictment form of remedy was left out of the laws relating to highways and common carriers, although retained in those concerning railroads and street railways. Pub. Sts. c. 52, § 17; c. 73, § 6; c. 112, §§ 212, 213. In 1886 (c. 140) an action of tort was allowed against street railways in case of the death of persons other than employees. The employers' liability act of 1887 (c. 270) provided a civil remedy for the instantaneous death of an employee, and this was extended to cases of death after

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conscious suffering by St. 1892, c. 260. St. 1897, c. 416, relating to gas and electric light corporations, and St. 1898, c. 565, extending liability to all individuals and corporations for the death of persons not in their employ, contain no provision for an indictment. This last statute was re-enacted in R. L. c. 171, § 2, and under it (as amended by St. 1907, c. 375) the present action was brought. It is apparent from this review that the liability created by the statute in question is one for which the only form of remedy is a civil proceeding, and presumably the rules of civil procedure are applicable.

Generally the rule of evidence requiring proof beyond a reasonable doubt in criminal proceedings does not apply to civil actions even when they arise from an act which is penal in its nature. Thus in complaints under the bastardy statute, it is sufficient to prove the charge by a preponderance of the evidence. *Richardson* v. *Burleigh*, 3 Allen, 479. *Young* v. *Makepeace*, 103 Mass. 50. So in an action to recover a forfeiture for the sale of intoxicating liquor to a minor, the rule requiring proof beyond a reasonable doubt does not apply. *Roberge* v. *Burnham*, 124 Mass. 277. So also in an action on a policy of insurance the defendant is not bound to prove beyond a reasonable doubt that the fire was occasioned by the wilful and fraudulent act of the plaintiff. *Schmidt* v. *New York Union Mutual Fire Ins. Co.* 1 Gray, 529. And see *Gordon* v. *Parmelee*, 15 Gray, 413; *Anderson* v. *Edwards*, 123 Mass. 273; 4 Wigmore on Evidence, § 2498. Whether St. 1907, c. 375, be considered as essentially a remedial and remunerative statute or as a penal one, the action brought under it has the elements and characteristics of a civil rather than a criminal proceeding. As was said by C. Allen, J., in *Kelley* v. *Boston & Maine Railroad*, 135 Mass. 448, 449: "The civil action differs in important particulars from the remedy by indictment. The latter is not available as a matter of right, but is a remedy in the name of the Commonwealth, dependent upon the action of the grand jury, and to be enforced by or under the direction of a public officer, and according to the forms of criminal proceedings. The civil action may be instituted by the executor or administrator of the deceased person of his own motion; the trial will be before the court, without a jury, unless a jury trial is demanded by one of the parties; in case of trial by jury, the damages are to be assessed by the jury; the burden of proof will be sustained by

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proving the issue by a preponderance of evidence; and the plaintiff will recover or be liable to costs, as the result of the case may be."

4. The charge on the question of due care was ample and correct.

Exceptions overruled.

MATTHEW E. GATELY, administrator, *vs.* JOSEPH B. TAYLOR & another.

211 - 452
214 - 266

Middlesex. November 21, 1911. — February 26, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Naphtha. Negligence. Evidence.

In an action for personal injuries alleged to have been suffered from an explosion of naphtha sold under an assumed name in violation of R. L. c. 102, § 108, if it appears that the substance sold to the plaintiff by the defendant was a liquid stove polish known as "6–5–4 Self Shining Stove Lusta," and an expert testifies that it was "naphtha with some pigment and a little thickening" and that "it is naphtha just as much as half a dollar is silver," the jury can find that the substance sold to the plaintiff was really and essentially naphtha and that the defendant is liable for the injuries suffered from its explosion.

A violation of R. L. c. 102, § 108, by a sale of naphtha under an assumed name is evidence of negligence in an action at common law to recover for personal injuries suffered from the explosion of such naphtha, alleged to have been sold negligently by the defendant to the plaintiff, and the plaintiff in such an action, if he presents evidence of due care on his part and of a sale by the defendant in violation of the statute, is entitled to go to the jury without showing expressly that the defendant knew of the nature of the substance sold by him or had any information of its dangerous qualities which should have put him upon inquiry.

In an action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have been suffered from an explosion of naphtha sold under an assumed name and sold negligently, where it appears that the substance sold to the plaintiff by the defendant was a liquid stove polish known as "lusta," evidence offered by the defendant, to show that "lusta" was an article generally sold in the market before as well as after the injury to the plaintiff, should be excluded as immaterial.

TORT by the administrator of the estate of Katherine E. Gately for injuries and consequent suffering sustained by the plaintiff's intestate on September 9, 1905, from the explosion of a substance sold to her by the defendants to be used as stove blacking, with a first count under R. L. c. 102, § 108, alleging that the injuries were caused by naphtha sold by the defendants under an assumed name, to wit: "6–5–4 Self Shining Stove Lusta," and a second count at

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common law alleging that the defendants negligently sold to the intestate a dangerous substance, negligently and carelessly representing it to be a safe stove blacking, and that the plaintiff's intestate was injured while she in the exercise of due care was applying the substance to a stove. Writ dated October 21, 1905.

In the Superior Court the case was tried before *Fox*, J. The facts which appeared in evidence are stated in the opinion. At the close of the evidence the defendants asked the judge to make the following rulings:

"1. Upon all the evidence and the pleadings, the plaintiff is not entitled to recover.

"2. Upon all the evidence, and the allegations therein contained, the plaintiff is not entitled to recover upon the first count.

"3. Upon all the evidence, and the allegations therein contained, the plaintiff is not entitled to recover upon the second count."

"5. The evidence will not warrant a finding that the defendants sold naphtha under an assumed name within the meaning of said section 108 [of R. L. c. 102]."

"9. The evidence will not warrant a finding that the defendants were negligent in not knowing that the substance sold contained a dangerous quantity of naphtha."

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff. The defendants alleged exceptions to the refusal of the judge to make the rulings quoted above and to the charge so far as it was inconsistent with them.

G. L. Mayberry, for the defendants.

J. E. Cotter, (*M. J. Connolly* with him,) for the plaintiff.

BRALEY, J. The plaintiff sues in tort under R. L. c. 102, § 108, and at common law to recover damages for the conscious suffering of his wife and intestate, alleged to have been caused by the wrongful acts of the defendants. The refusal to give the first three requests, that upon all the evidence and the pleadings the plaintiff could not recover under either count, presents for decision as the principal question, whether the jury were warranted in returning a general verdict for the plaintiff. *Oulighan* v. *Butler*, 189 Mass. 287, 289. *Murphy* v. *Russell*, 202 Mass. 480. The defendants as retail dealers in hardware and stoves kept for sale and sold, with other stove polishes, a liquid stove polish known as "6–5–4 Self

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Shining Stove Lusta." It was contained in small round cans with a label on which, under the heading of directions, the excellences of the preparation as a stove polish and the manner of application were elaborately printed. The article with the knowledge and assent of the defendants, as appeared by their testimony, had been advertised in the local papers by the manufacturers from whom they purchased it in bulk, as being kept for sale by them, and although the advertisement recommended its use they were ignorant of its composition. The conflicting expert testimony left to the jury the credibility of the witnesses and the weight of the evidence, and they could accept the opinion of the plaintiff's witness, who positively stated, that it was "naphtha with some pigment and a little thickening," and "notwithstanding all that is said about qualifying phrases it is naphtha just as much as half a dollar is silver," rather than the conclusion of the defendants' expert, that it was "an asphalt paint." The son of the decedent at her request bought a can of the defendants, and in the afternoon of the day of purchase, while she was using the contents on a cooking range in which the fire had not been extinguished, an explosion suddenly followed, enveloping her in flame and causing such grave injuries that her death followed after a period of intense pain. If it were not that the defendants urge the question of her due care, it would be unnecessary to add, that the "directions" specified, "if a greater luster is desired, apply when iron is warm," and that generally stove polishes in common experience do not explode, even when applied to heated surfaces. It is sufficient that as matter of law she was not shown to have been careless. *Baldwin* v. *American Writing Paper Co.* 196 Mass. 402, 407. *Thompson* v. *Cambridge Gas Light Co.* 201 Mass. 77.

The substantial inquiry upon this evidence is the construction to be given to R. L. c. 102, § 108, making it a penal offense to sell, offer, or keep for sale, "naphtha under an assumed name." Naphtha has been defined as a product of petroleum intermediate between the associate products of gasoline and benzine, all of which do not differ in their essential nature, but vary only in the degree of inflammability when brought into contact with radiant heat. Webster's New International Dict. *Morse* v. *Buffalo Fire & Marine Ins. Co.* 30 Wis. 534, 536. The inflammable and explosive qualities of petroleum and its

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products have been generally recognized as calling for statutory regulations governing their storage and sale, for the protection of the public; and in this jurisdiction the first legislation upon the general subject is the St. of 1865, c. 244. The statute, however, and the succeeding St. of 1866, c. 285, which repealed the previous act, went no farther than to provide that crude petroleum or any of its products should not be kept, manufactured or refined in quantities exceeding five hundred gallons without a license from the public authorities, unless "stored, kept manufactured or refined, in detached and properly ventilated buildings, specially adapted to the purpose and surrounded by an embankment so constructed as to effectually prevent the overflow of said petroleum or any of its products" beyond the premises. The next enactment, the St. of 1867, c. 286, which repealed the St. of 1866, c. 262, is entitled "An Act regulating the sale of coal and petroleum oils." By § 5 any person who sold, kept or offered for sale naphtha under the name of oil was upon conviction subject to fine or imprisonment or both, and by § 3 also was made liable in damages to any person suffering injuries from the explosion or ignition of such oil unlawfully sold. *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64. The St. of 1869, c. 152, followed, and while by § 2 no person shall mix for sale naphtha and illuminating oils or shall sell or offer for sale such mixtures unless for the purposes of re-manufacture into illuminating oil made from coal or petroleum, which would not ignite beyond a fixed standard of temperature, by § 4 the sale of naphtha under an assumed name was for the first time generally prohibited. This section appears without change in the Pub. Sts. c. 102, § 71, and the R. L. c. 102, § 108. It is not impossible to say that the prohibition refers only to the sale of naphtha under the name of petroleum or some of its other enumerated products. But this would not reach the mischief which the statute obviously was intended to prevent. The designations under which naphtha might be sold would be as various as its fluid nature would permit, and the seller would not be subject to a penalty. A commercial compound of which one of the substantial parts might be naphtha, yet when combined with other ingredients it became as a whole a distinct and independent product, would not come within the statute. But if the contributed parts merely supplied coloring to the fluid,

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with a slight thickening making the mixture adhesive when applied, then the jury must determine whether the article sold does not remain really and essentially naphtha. *Commonwealth* v. *Wentworth,* 118 Mass. 441, 442. The statutory regulation is absolute, and in a criminal prosecution want of knowledge by the seller would not be a defense. He violates the statute, which is a police regulation, at his peril. *Commonwealth* v. *New York Central & Hudson River Railroad,* 202 Mass. 394, 398. *Commonwealth* v. *Mixer,* 207 Mass. 141. Section 108, however, not only imposes a penalty, but under § 106 the defendants, if found to have transgressed, also were made liable in a civil action for any damage suffered by the decedent from the explosion or ignition of the naphtha, independently of any question of negligence on their part. *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64, 70. *Hourigan* v. *Nowell,* 110 Mass. 470, 473. The allegations of the first count were sufficient under the statute, and the jury were warranted in finding that they had been sustained by the evidence to which sufficient reference has been made.

The plaintiff under the second count offered no affirmative evidence that the defendants knew of the nature of the contents of the can, or had any information of its dangerous qualities which should have put them upon inquiry. The defendants, however, sold the article illegally, and, their illegal act having contributed to the decedent's injury, the plaintiff under the second count could sue at common law as well as under the statute. *Coffin* v. *Field,* 7 Cush. 355, 358. *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64. *Pollock* v. *Eastern Railroad,* 124 Mass. 158. *Ransom* v. *Boston,* 192 Mass. 299. 1 Com. Dig. Action upon Statutes, 442. See Cooley on Torts, (3d ed.) 1408, n. 96, and Wharton on Negligence, § 443, n., for a collection of cases. The duty imposed is for the safety and welfare of the members of the community, and "as a general rule," said Mr. Justice Devens in *Parker* v. *Barnard,* 135 Mass. 116, 120, following *Salisbury* v. *Herchenroder,* 106 Mass. 458, 460, "where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty." If the jury were satisfied of the violation of the statute there was evidence for their consid-

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eration of the defendants' negligence, which was aptly charged in the allegations of this count. *Brunelle* v. *Lowell Electric Light Co.* 188 Mass. 493, 498. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580, 582. *McCarthy* v. *Morse*, 197 Mass. 332, 337. *Field* v. *Gowdy*, 199 Mass. 568, 573. *Davis* v. *John L. Whiting & Son Co.* 201 Mass. 91, 96. *Moran* v. *Dickinson*, 204 Mass. 559. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519, 522, 523. *Siemers* v. *Eisen*, 54 Cal. 418. *Carrigan* v. *Stillwell*, 97 Maine, 247. *Baxter* v. *Coughlin*, 70 Minn. 1. *Horton* v. *Wylie*, 115 Wis. 505. *Brannock* v. *Elmore*, 114 Mo. 55. *McRickard* v. *Flint*, 114 N. Y. 222, 226.

The objection that because of some of the expressions used by the pleader the second count might be objectionable for duplicity could be raised, if at all, only by a motion to strike out, or a motion to compel the plaintiff to elect at the close of the evidence. *King* v. *Howard*, 1 Cush. 137, 141. *Burns* v. *Scooffy*, 98 Cal. 271. *Golding* v. *Wharton Saltworks Co.* 1 Q. B. D. 374. And whatever apprehension the defendants may have had, that they might be held liable in deceit for misrepresentations as to the nature of the article sold as "lusta," were removed by the giving of their requests on this point accompanied with appropriate comments. No exceptions were taken to the instructions except so far as they were inconsistent with the first, second, third, fifth and ninth requests, which for reasons sufficiently stated the judge properly declined to give. If the defendants deemed the instructions as to the second count insufficient, or erroneous, they should have specifically excepted; but not having done so, this part of the charge cannot be reviewed. *Ridenour* v. *H. C. Dexter Chair Co.* 209 Mass. 70, 78, and cases cited.

Nor were the rulings upon questions of evidence incorrect. The answer of the defendants put in issue every material allegation of the declaration, and the advertisement that they kept "lusta" for sale was clearly relevant, while the evidence offered by them, that it was an article generally sold in the market before as well as since the injury to the decedent, was rightly excluded. If other dealers whether within or without this Commonwealth sold naphtha as "lusta," this fact afforded the defendants no justification for their violation of the statute.

Exceptions overruled.

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PAULINE JONES *vs.* CITY OF FITCHBURG.

Worcester. December 8, 1911. — February 27, 1912.

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Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Schools and School Committees.

At the trial of an action by a school girl against a city under R. L. c. 44, § 7, for the alleged unlawful exclusion of the plaintiff from the defendant's schools, there was evidence tending to show that in the school which the plaintiff had attended there was maintained as part of a course in civil government an exemplification of the defendant's system of municipal administration, various pupils performing duties as municipal officers, and that the plaintiff had been performing duties as a police officer, that in the performance of such duties the plaintiff and the principal of the school had disagreed, that the plaintiff had refused to act further as a police officer, and that the principal then had informed her that unless she continued with such duties she would not be permitted to attend school. After interviews and correspondence between the plaintiff and her father on the one side and the principal, the superintendent of schools and the school committee on the other, the plaintiff's father demanded from the school committee a statement in writing of the reasons for the plaintiff's expulsion, to which the committee replied that the plaintiff might "return to school upon condition that she submit to the direction of the principal." There was no hearing by the committee on the question. *Held*, that the jury were warranted in finding that the action of the school committee amounted to a permanent exclusion of the plaintiff without a hearing, and in finding for the plaintiff.

TORT under R. L. c. 44, § 7, for the unlawful exclusion of the plaintiff from the defendant's public schools. Writ dated May 9, 1908.

In the Superior Court the case was tried before *Bell*, J. The reply, referred to in the opinion, of the defendant's school committee to the letter of the plaintiff's father asking for a statement in writing of the reasons for the plaintiff's exclusion from the school stated the following: "At a meeting of the school board of this city held upon above date, the visiting committee of the Ashburnham Street School reported to the board that your daughter Pauline had been suspended by Principal Hopkins for refusing to obey his directions. It was voted, that 'the secretary of the board be instructed to inform Mr. Jones, the father of Pauline Jones, that his daughter may return to school upon condition that she submit to the direction of the principal of the school.'"

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At the close of the evidence the defendant asked for the following rulings, which were refused by the presiding judge:

"1. In this case there was no permanent exclusion. The plaintiff was permitted to return to school if she would obey the proper authority of the teacher.

"2. In this case there was no permanent exclusion.

"3. In this case there was no unlawful exclusion.

"4. On all the evidence the plaintiff cannot recover."

In answer to questions submitted to them, the jury found that the plaintiff was permanently excluded from the defendant's schools, that her father in her behalf asked for a hearing before the school committee on the matter of the exclusion, and that in passing upon the plaintiff's case the school committee did not act in good faith. They found for the plaintiff in the sum of $1,075, which verdict, by order of the presiding judge, was reduced to $600. The defendant alleged exceptions.

The case was submitted on briefs.

J. F. McGrath, for the defendant.

D. I. Walsh & T. L. Walsh, for the plaintiff.

BRALEY, J. The general management of the public schools having been conferred on the school committee, the plaintiff's exclusion was not unlawful unless they acted in violation of the provisions of R. L. c. 44, §§ 7, 8, under which the action is brought. *Bishop* v. *Rowley*, 165 Mass. 460. *Morrison* v. *Lawrence*, 186 Mass. 456, 459. R. L. c. 42, § 27. At the grammar school where she attended, a course in civil government had been prescribed in which the functions of the various officers required by the defendant's system of municipal administration were exemplified by the pupils, and while in the performance of the duty of a policeman, to which she had been assigned, differences arose between the plaintiff and the principal. The aspersions upon her honesty, which the jury could find caused the difficulty, were finally decided by him to be without foundation. The plaintiff, however, desired to be relieved from the office, and upon his refusal to grant the request, declined to act further, when he informed her, that without compliance she would not be permitted to attend school. The order was enforced, and the interviews and correspondence in which the plaintiff and her father, the principal, and the superintendent of schools, who also acted as secretary of the school

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committee, participated, having failed to adjust the controversy, a written application was made by the plaintiff's father asking that, in accordance with § 7, a statement in writing be furnished giving the reasons for his daughter's exclusion. The reply returned must be read in connection with the undisputed evidence. It appears that through a subordinate committee of visitation, whose report was before them, the full committee had been informed of the circumstances. The board consequently knew that the plaintiff had been denied readmission and deprived of the benefit of the public schools because of alleged misconduct. They also must have been aware that their vote then passed to sustain the principal established a condition which could be terminated only by the acknowledgment of the plaintiff, that her conduct was unjustifiable, although upon an impartial inquiry by the committee she might have been exonerated, or a less severe penalty might have been imposed. It was open to them upon receiving the application to have ordered a hearing, and decided the question whether she had been guilty of insubordination, and their decision affirming the order, if made in good faith would have been final. *Morrison* v. *Lawrence*, 186 Mass. 456, 459. But instead, the committee voted to inform him, that the plaintiff had been suspended for refusing to obey the principal's directions, and that she could return to school at any time upon acceding to the terms to which we have referred. The jury were warranted in finding, that the severance of the plaintiff from the school, even if characterized in the vote as a suspension, operated, and was intended to operate for an indefinite period, and in effect amounted to a permanent exclusion, which could not be justified unless preceded by the hearing required by § 8. *Spiller* v. *Woburn*, 12 Allen, 127. *Carnig* v. *Carr*, 167 Mass. 544. *Lord* v. *Goldberg*, 81 Cal. 596. If found to be permanent, the exclusion was unlawful for the reasons stated, and the defendant's requests were properly denied.

Exceptions overruled.

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MORRIS E. HENDERSON & others *vs.* EVERETT W. PARSONS & another.

Essex. December 13, 1911. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY & SHELDON, JJ.

Poor Debtor.

The condition of a recognizance entered into by a debtor and a surety upon the debtor's arrest upon an execution, that within thirty days from the date of his arrest the debtor will both deliver himself up for examination by the proper magistrate and give notice to the judgment creditor of the time and place fixed by the magistrate for the hearing, is broken if the debtor within the thirty days so delivers himself up and asks for the assignment of a day for a hearing and the magistrate directs the clerk of the court to issue the notice to the judgment creditor, but the notice is not issued within the thirty days.

CONTRACT upon a poor debtor's recognizance entered into by the defendant Everett W. Parsons as a judgment debtor and the defendant Lina F. Parsons as surety. Writ dated August 26, 1909.

In the Superior Court the case was heard by *Raymond*, J., without a jury. The following facts appeared:

On June 20, 1908, the judgment debtor was arrested on execution and taken before the District Court of Eastern Essex, when he and the surety entered into the recognizance in accordance with R. L. c. 168, § 30. On July 20, 1908, the judgment debtor and his counsel appeared in the District Court of Eastern Essex and called the attention of the clerk to their presence and that the judgment debtor appeared for the purpose of delivering himself up for examination and desired to take the oath for the relief of poor debtors. Before the attention of the presiding judge was directed to the judgment debtor's presence, the court adjourned and the judge retired to his office which was in another building. Immediately after the adjournment of court on the same day, the judgment debtor and his counsel went to the office of the judge and stated to him that the judgment debtor was there to deliver himself up for examination and to request that a time and place be fixed for his examination by the judgment creditors, and that

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a notice thereof be issued to the judgment creditors, that the judgment debtor might be examined and take the oath for the relief of poor debtors. The judge ordered the judgment debtor to go to the clerk and direct him to issue the notice, according to the statute. The judgment debtor and his counsel then went to the office of the clerk and communicated to him the order of the judge. The clerk stated that he desired time "to look up the law" in reference to the issuance of the notice and directed the counsel for the judgment debtor to come into the clerk's office later and he "would have the law looked up." In the afternoon of the same day and on several days thereafter and before August 1, the counsel for the judgment debtor went to the office of the clerk and requested that the notice be issued, but on each occasion the clerk desired further time to look up the law in reference to the issuance of the notice. On August 1, 1908, the judgment debtor and his counsel were present in the District Court of Eastern Essex and called the attention of the judge to the fact that the notice had not been issued. The judge then and there ordered the clerk to issue the notice fixing August 5, 1908, at nine o'clock A. M., as the time, and the court room of the District Court of Eastern Essex as the place for examination of the debtor, the notice to issue as of July 20, 1908; and thereupon notice was issued dated July 20, 1908, and was served by a proper officer on the counsel for the judgment creditors and was delivered into court with a proper return thereon. On August 5, 1908, at nine o'clock A. M., the judgment debtor and his counsel appeared in the District Court of Eastern Essex for the examination of the judgment debtor. The counsel for the judgment creditors was present in court and objected to the jurisdiction of the court because no proper notice had been issued, and also filed a petition to amend the docket records of the court. There were continued hearings on the debtor's application to take the oath for the relief of poor debtors, and upon all other matters. On August 8, 1908, the docket records of the District Court of Eastern Essex were amended to state the facts as to the date of the issuance of the notice, and on August 29, 1908, examination and oath were refused to the judgment debtor.

The judge found for the plaintiffs, and assessed damages in the sum of $251.25. He reported the case for determination by this

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court, judgment to be entered upon the finding if the finding was warranted in law; otherwise, judgment to be entered for the defendants.

G. F. Merrill, for the plaintiffs.

H. B. Knowles, for the defendants.

BRALEY, J. By the terms of the recognizance given by the defendants, the judgment debtor, if he desired to take the oath for the relief of poor debtors, became bound within thirty days from the date of his arrest to deliver himself up for examination before a court or magistrate qualified to act, and to give notice to the plaintiffs of the time and place fixed for the hearing. R. L. c. 168, §§ 30, 33. It is not a sufficient compliance with the conditions, that the debtor's application should be seasonably made, but the notice must be issued before the expiration of the thirty days, even if the return day may be beyond the period. *Barnes* v. *Ladd*, 130 Mass. 557. *Marple* v. *Burton*, 144 Mass. 79. *Ryder* v. *Ouellette*, 194 Mass. 24. The court to which the debtor applied before the time expired concededly had jurisdiction, and the clerk should have issued the proper order of notice as directed by the standing justice and requested by counsel. R. L. c. 168, §§ 33, 73. St. 1910, c. 84. But through the clerk's delay, the notice did not actually issue, nor was it served, until more than thirty days had elapsed from the date of arrest. The attention of the court having been called to the irregularity, the clerk was directed to make the date on the docket record when the notice issued correspond with the date of the application, but on motion of the plaintiffs the record subsequently was further amended by making the entry conform to the true date. It thus appears from the final record, which is to be taken as a true transcript of the proceedings, that the notice and service were invalid, and, it being too late to give a new notice, the condition of the recognizance was broken. The execution having been superseded by the recognizance, the subsequent examination of the debtor and refusal of the oath were not within the jurisdiction of the court, and under the terms of the report the plaintiffs are entitled to judgment for the amount found by the presiding judge. *Morgan* v. *Curley*, 142 Mass. 107. *Bliss* v. *Kershaw*, 180 Mass. 99, 103.

So ordered.

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SHAWMUT COMMERCIAL PAPER COMPANY *vs.* PERCY H. BRIGHAM & another.

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Suffolk. January 8, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Statute, Construction, Amendment, Revision. *Small Loans Act. Bills and Notes. Waiver.*

The provisions of R. L. c. 102, § 51, relating to the discharge of a loan of less than $1,000 by the payment or tender of the principal actually borrowed, interest at the rate of eighteen per cent per annum and not more than $5 for actual expenses of making and securing the loan, being a recodification of previous legislation beginning with St. 1888, c. 388, which referred to "all loans" irrespective of whether they were secured by mortgages or pledges of personal property, apply to all loans, whether secured or unsecured, as did the statutes which are therein codified, although the section stands under a subtitle reading "Loans or Pledges on Personal Property."

In a statute which is a codification or revision of previous legislation, titles or headings prefixed to subdivisions of a chapter can have no effect to change the meaning of the statutes included in the codification or revision unless such change plainly was intended by the Legislature.

In return for a loan of $450, the borrower gave the lender an unsecured promissory note for $550 due in four months. Nearly nine months thereafter, the lender having brought an action for a balance due on the note, the borrower settled the action by paying the lender $160.50 and giving a new note for $450 due in two months, the $160.50 representing $100 paid to reduce the principal of the former note, $15.50 as estimated costs, and $45 as advance interest upon the new note. Upon the maturity of the second note the lender brought an action upon it and the borrower contended that under the provisions of R. L. c. 102, § 51, the lender could recover only the balance still due of the amount of money actually lent in the original transaction with interest at eighteen per cent per annum and $5 for the expense of making and securing the loan. *Held*, that the borrower had failed to take advantage of the right given to him by the statute to discharge his indebtedness in the manner there provided, and therefore that the lender might recover the full amount of the second note with interest from the date of the writ.

CONTRACT against Percy H. Brigham as maker and Owen Goldsmith as indorser of a negotiable promissory note for $450. Writ dated May 31, 1910.

In the Superior Court the case was tried before *Sanderson*, J. It appeared that on July 24, 1909, the defendants gave to the plaintiff a note signed and indorsed like the note in suit for $550

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payable in four months, and that the actual money lent thereon was $450. On April 8, 1910, an action was brought by the plaintiff for a balance remaining due on that note. On April 14, 1910, the defendants paid the plaintiff $160.50 and gave it the note in suit which was dated March 24, 1910, and was payable in two months from that date. The plaintiff thereupon surrendered the former note and dismissed the action it had brought thereon. Of the $160.50 paid in cash, $100 was to reduce the principal of the former note, $15.50 was to pay estimated costs in the suit brought thereon, and $45 was to pay interest on the new note for the two months that it was to run.

At the close of the evidence the defendants asked the presiding judge to rule in substance that the note in suit was a renewal of the former note, and that "at the date of the writ there was due and payable to the plaintiff no more than the original sum actually borrowed, with interest at the rate of eighteen per cent per annum from the time said sum was borrowed . . . until the date of the writ, . . . and a sum not exceeding $5 for the actual expenses of making the loan; but there shall be subtracted from the principal at the date of each payment the sums in excess of such interest paid from time to time." The rulings were refused.

In answer to a question by the judge, the jury found that the note in suit was given as a part of the consideration for the settlement of the action brought by the plaintiff on the former note. Thereupon the judge ordered a verdict for the plaintiff for the amount of $450 with interest from the date of the writ; and the defendants alleged exceptions.

Other facts are stated in the opinion.

E. I. Smith, for the defendants.

E. M. Schwarzenberg, for the plaintiff.

SHELDON, J. We cannot accept the plaintiff's contention that the provisions of R. L. c. 102, § 51, apply only to loans secured by mortgage or pledge of personal property. That section is a codification of prior legislation, which began in St. 1888, c. 388. That act by its terms covered "all loans" thereafter contracted "for less than one thousand dollars," and must of course be applied to all loans whether unsecured or secured in any manner whatever. St. 1890, c. 416, § 6, recognized St. 1888, c. 388, as still in force. By St. 1892, c. 428, § 1, the statute of 1888 was re-

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enacted, with a reduction in the fee which lenders were allowed to charge for making papers. Other sections of the act of 1892 provided for the case of such loans secured by mortgage or pledge of personal property. But the first section of this later act was still left to apply to all loans, secured or unsecured. This was the manifest intention of the Legislature. And the same construction must of course be given to the statute as codified in the Revised Laws, in spite of the title prefixed to § 47 of c. 102. The construction of a statute is not to be affected by verbal changes in a revision, unless that was plainly intended by the Legislature. *Great Barrington* v. *Gibbons*, 199 Mass. 527, 529. Much less can titles or headings prefixed to subdivisions of a chapter in a codification have such an effect.

It follows that while the original note given by the defendants to the plaintiff remained unpaid, they might have paid or tendered to their creditor the amount of the actual loan made to them, with interest at the rate of eighteen per cent a year and the additional sum of $5, after applying in reduction of the principal sum all payments which they had made in excess of that rate of interest. This would fully have discharged their indebtedness. But it was their personal privilege, to be availed of only at their election; their note was not an unlawful contract, nor was it invalid. *Spofford* v. *State Loan Co.* 208 Mass. 84. *Reed* v. *Boston Loan Co.* 160 Mass. 237. They did not exercise their statutory right, and the plaintiff sued them upon the note. They still might have discharged their indebtedness by making the same payment or tender (R. L. c. 102, § 51), with what legal costs had accrued, but they failed to do so. Instead thereof, as the jury have found and were warranted in finding, they chose to settle the action by paying a certain sum of money and giving the note now sued on. The making of such a payment or tender was a condition precedent to the discharge of their liability under the statute. Without that, they remained liable upon their note, and it was right to order a verdict for the plaintiff.

But there was evidence that the money which they paid to the plaintiff when the former suit was settled and the present note was given included, besides what was demanded for the settlement of that suit, the sum of $45 for interest paid in advance upon the new note, that is, of course, until the note should become due. If so,

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the amount actually lent upon this note was only $450, and the defendants might have discharged their indebtedness by the payment or tender of this sum with the interest and expenses prescribed by the statute. But they did not choose to do this, and so cannot now complain of having been held to their bargain. As the verdict included only interest at the rate of six per cent from the date of the writ, they have not been subjected to the burden of any double interest.

Judgment on the verdict.

SARAH E. CLEVELAND *vs.* BOSTON ELEVATED RAILWAY COMPANY.

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Suffolk. January 8, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Street railway. *Way*, Public.

At the trial of an action against a street railway company by one who, while a traveller upon a highway in a city on which the defendant maintained tracks and ran its cars, was injured by falling into an insufficiently guarded trench which the plaintiff alleged that the defendant had assumed the duty of guarding, if there is evidence tending to show that, to facilitate the running of its cars, it was for the advantage of the defendant not to have barriers placed across its tracks and that there had been a conversation between a representative of the defendant and a contractor, who under a permit from the city was making the excavation, in consequence of which the defendant sent a watchman to guard the trench and provided wooden horses, planks and lanterns for that purpose, and that it was through negligence of the watchman that the plaintiff was injured, the question, whether the defendant was liable for the plaintiff's injury, is for the jury.

TORT for personal injuries caused by the plaintiff falling into an excavation in South Street in that part of Boston called Roslindale owing to the excavation not being properly guarded, it being alleged that the defendant had assumed the responsibility of keeping it guarded. Writ dated January 16, 1909.

In the Superior Court the case was tried before *Brown*, J. The material facts are stated in the opinion. At the close of the evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

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H. Dunham, for the plaintiff.

W. Kittredge, (*M. J. Sullivan* with him,) for the defendant.

DeCourcy, J. The plaintiff's due care is conceded. Upon all the evidence the negligence of the defendant was also a question for the jury. Primarily it was under no obligation to guard this trench in the street. *Leary* v. *Boston Elevated Railway*, 180 Mass. 203. But if the railway company entered into an arrangement with the city, or with the contractor who was responsible to the city, to guard the trench, the duty of protecting travellers from the danger of an unguarded trench became the defendant's business. *Phinney* v. *Boston Elevated Railway*, 201 Mass. 286.

The trench extended from the side of the street to about two feet under the nearest car track. The earth taken from the excavation was heaped along both sides of the trench, and extended from the building through the sidewalk and street to within two or three feet of the nearest rail. The space between the end of these piles of dirt and the end of the trench within the rails could not be guarded by barriers without preventing the passage of the electric cars. Consequently the defendant's interest suggested the adoption of some method whereby the opening in the public street should be made safe for travellers without compelling it to remove and replace barriers every time that one of its cars passed. It was in evidence that the watchman whose duty it was to guard the trench had been sent there by the defendant in consequence of a conversation held between the contractor and some person representing the defendant company. And it further appeared that the railway company also provided, for use in guarding the trench, two wooden horses, two red lanterns and some planks. Upon all the evidence it was a question of fact for the jury whether the defendant had agreed to relieve the city and contractor from guarding the excavation at the place of the accident and had assumed the duty of protecting travellers from the danger. *Boucher* v. *New York, New Haven, & Hartford Railroad*, 196 Mass. 355, 358.

There was evidence of negligence on the part of the watchman. He saw the plaintiff approaching the unguarded excavation, but was away from his post and his lantern was extinguished.

Exceptions sustained.

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EVA HOTENBRINK *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 9, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Street railway.

At the trial of an action by a woman against a street railway company for personal injuries caused by the plaintiff slipping upon some tobacco spit about the size of a silver half dollar upon the step of a car of the defendant as she was leaving the car, if there is no evidence tending to show how or when the tobacco spit came upon the step and none that the conductor knew or had any reason to know of its presence there, it is proper to order the jury to find for the defendant, although the conductor of the car testifies that he recognized it as his duty under the rules of the company to see that no slippery substance was allowed to fall or remain on the steps of the car.

TORT for personal injuries alleged to have been caused by the plaintiff slipping upon some tobacco spit upon the rear step of a closed electric street car of the defendant as she was leaving the car. Writ in the Municipal Court of the City of Boston dated December 29, 1909.

In the Superior Court the case was tried before *Quinn,* J. Besides the facts stated in the opinion, there was evidence tending to show that the plaintiff boarded the car in question at Adams Square in Boston and that the injury occurred as she was alighting at L Street in that part of Boston called South Boston; that fifteen minutes before the car reached L Street it had left a transfer station on Dorchester Avenue, and that during that fifteen minutes the conductor had stood on the rear platform practically in front of the door of the car, from which position he could see, without leaning over, only the outer edge of the step; that in the rear vestibule with him until about two minutes before the car reached L Street were two men; that about twenty or twenty-five persons had passed over the step in question after the car left Dorchester Avenue; that at L Street a woman and a child alighted before the plaintiff and the conductor had got down from the car to lift down the child. The conductor testified that he recognized it as his duty under the rules of the company to see that no

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slippery substance was allowed to fall or remain on the car steps.

At the close of the evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. P. Murray, for the plaintiff.

S. E. Wardwell, for the defendant.

DeCourcy, J. There was evidence for the jury of the plaintiff's due care, and we do not understand that the defendant contends to the contrary. The sole question here is that of the defendant's negligence, involved in the presence of some tobacco spit of the size of a silver dollar or half dollar on the rear step of the car.

Even if it be assumed that the presence of tobacco spit would produce a slippery condition on the car step, the plaintiff was bound to show that the defendant's conductor knew it was there, or by the exercise of the care owed to the plaintiff would have seen and removed it.

There is no evidence that the conductor knew the saliva was there. No witness in the case, with the exception of the plaintiff and the child Clausina Bookhaut, testified that the alleged condition existed even at the time of the accident; and no witness testified to its existence before the plaintiff alighted. The momentary presence of such a substance on the step would not render the defendant liable. *Goddard* v. *Boston & Maine Railroad*, 179 Mass. 52. *Lyons* v. *Boston Elevated Railway*, 204 Mass. 227. There was nothing in its appearance from which the inference could be drawn that it had been upon the step for a considerable period of time. *Anjou* v. *Boston Elevated Railway*, 208 Mass. 273. The inference that it must have been there for two minutes, or since the preceding stop at H or I Street, is merely conjectural, for it might have come from some passing teamster or pedestrian or otherwise.

And the evidence fails to show that the conductor was negligent in failing to see this substance on the step before the plaintiff fell; his position on the rear platform, to the left of the controller, would enable him to see only the outer edge of the step. It was not something to be anticipated like the accumulation of mud and slime on rainy days, *Kingston* v. *Boston Elevated Railway*, 207 Mass. 457, or of snow and ice during our winter season. *Foster* v. *Old Colony Street Railway*, 182 Mass. 378. Nor did the testimony disclose any rule of the company imposing upon the con-

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ductor a special duty to examine the car steps for tobacco spit. *Kingston* v. *Boston Elevated Railway*, 207 Mass. 457.

On the evidence presented the plaintiff was not entitled to go to the jury on the issue of the defendant's negligence.

Exceptions overruled.

MARGUERITE PURCELL *vs.* BOSTON ELEVATED RAILWAY COMPANY.

PHILIP J. PURCELL *vs.* SAME.

Middlesex. January 10, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, Due care of plaintiff, Due care of child.

At the trial of an action against a street railway company by a girl six and one half years of age to recover for injuries caused by her being run into by a street car of the defendant as she was crossing a street at its intersection with another street, there was evidence tending to show that the plaintiff was old enough and possessed of sufficient intelligence and experience to be permitted to go upon the street unattended, that, just before she stepped upon the crosswalk she looked up the street to her right, in which direction there was a hill that prevented her seeing more than twelve hundred feet, and saw no car approaching, that from the other direction there was a car coming and that she waited on the edge of the sidewalk until that car had stopped in front of her, when she passed about four feet behind it in crossing the street and was struck by a car which was coming down the hill from her right on the farther track "quite rapidly" and upon which no warning gong had been rung, that the defendant's rules required the ringing of a gong at street crossings and in passing a stationary car, and that the plaintiff knew of the custom of sounding gongs under such circumstances. *Held*, that the question, whether the plaintiff exercised the degree of care which an ordinarily prudent and careful girl of her age reasonably might be expected to use under like circumstances, was for the jury.

TWO ACTIONS OF TORT, the first by a girl six and one half years of age to recover for personal injuries caused by her being run into by a street car of the defendant as she was crossing Massachusetts Avenue in Arlington, and the second by the father of the plaintiff in the first action to recover for loss of services and the expense of medical attendance due to her injuries. Writs dated June 16, 1908.

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In the Superior Court the cases were tried together before *Lawton*, J. The facts are stated in the opinion. At the close of the evidence the defendant asked for rulings that on all the evidence the plaintiffs could not recover. The rulings were refused. The jury found for the plaintiff in the first case in the sum of $1,500, and for the plaintiff in the second case in the sum of $75; and the defendant alleged exceptions.

F. W. Fosdick, for the defendant.

R. H. Sherman, for the plaintiffs.

DeCourcy, J. The sole question in these cases is, Was there evidence upon which the jury could find that Marguerite Purcell, hereinafter called the plaintiff, was in the exercise of due care? It is conceded that there was evidence of the defendant's negligence; and the case was submitted to the jury under instructions to which no exception was taken.

Upon the issue in question the evidence tends to show the following facts: At 4.45 P. M., on May 14, 1908, the plaintiff, who was nearly six and one half years of age, stood at the southwest corner of Massachusetts and Park Avenues in Arlington and looked both ways along Massachusetts Avenue to see whether any electric cars were approaching. She saw no car coming from the direction of Boston; and although her testimony was that the distance she could see was not "very far because it was a hill," and was equal to the distance "from the witness stand to a building across the street," which was estimated by counsel to be about one hundred and ten feet, the jury might adopt the motorman's statement that "from the place of the accident to the top of the hill towards Boston the street is straight and one can see for a distance of three minutes' walk, or four hundred yards." She saw a Boston bound car coming from the north, or from Lexington, and waited at the edge of the sidewalk until this car stopped at the usual stopping place for inbound cars, directly in front of and about ten feet distant from where she was standing. She then stepped upon the crosswalk, passed about four feet in the rear of this stationary car, and as she stepped upon the farther or outbound track was struck by a car coming from Boston. She also testified that when she was walking behind the standing car she listened but did not hear any car coming; and the jury could find that the motorman did not ring the gong, although the defendant's rules required

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him to do so when passing standing cars. There was evidence that the outbound car which struck the plaintiff was going quite fast, and that after the collision it did not stop until it went twenty or twenty-five feet, or across Park Avenue.

The plaintiff was concededly old enough and possessed of sufficient intelligence and experience to be permitted to go upon the street unattended. The standard by which her conduct must be tested, however, is not that of an adult. See *Kennedy* v. *Worcester Consolidated Street Railway*, 210 Mass. 132. She must show that she exercised the degree of care which an ordinarily prudent and careful girl of her age is accustomed to use or reasonably may be expected to use under like circumstances. It was a question of fact for the jury whether her conduct measured up to that standard. *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126. *Burns* v. *Worcester Consolidated Street Railway*, 193 Mass. 63.

From the plaintiff's statement that when she was behind the standing car she listened and did not hear any car coming, considered in connection with her knowledge of the running of electric cars as shown by the testimony of her mother, the jury could infer that the plaintiff knew of the custom to sound the gong on a car that was approaching a standing one, and that she relied somewhat upon the fact that she heard no warning gong from the car which struck her. *Murphy* v. *Boston Elevated Railway*, 204 Mass. 229. This was evidence of some care, and is sufficient to distinguish the case at bar from those where the evidence shows an entire absence of care on the part of the plaintiff. *Mullen* v. *Springfield Street Railway*, 164 Mass. 450. *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562. *Holian* v. *Boston Elevated Railway*, 194 Mass. 74. And the jury may have believed that the failure of the plaintiff to hear the noise of the approaching car was due to its distance at the time, and that the intervening space was travelled in a few seconds by reason of the high speed at which the car was running. We are of opinion that the cases were rightly submitted to the jury.

Exceptions overruled.

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MOSES SNOW *vs.* REVERE RUBBER COMPANY.

Suffolk. January 11, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

A carpenter in going from the roof of one building to that of another used a ladder which he placed with its iron spurs implanted in the tar of a sloping gravel roof. While he was working on the roof of the adjoining building, a superintendent of his employer inserted two pieces of board under the spurs of the ladder without giving the carpenter any warning of the change. When the carpenter started to descend the ladder it slid out from the bottom and he was injured. *Held*, that, although the act of inserting the boards was a manual one, the adoption of the plan of resting the spurs of the ladder on unsecured boards upon a sloping gravel roof could be found to have been an act of superintendence under R. L. c. 106, § 71, cl. 2, and to have been negligent.

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TORT under R. L. c. 106, § 71, cl. 2, for personal injuries alleged to have been received by the plaintiff on May 7, 1908, while in the employ of the defendant as a carpenter at its rubber factory in Chelsea and caused by the negligence of a superintendent of the defendant, one John S. Murray. Writ dated April 8, 1909.

In the Superior Court the case was tried before *Sherman*, J. The material facts in evidence and the course of the trial are stated in the opinion. At the close of the evidence, the defendant asked the presiding judge to rule as follows:

"1. On all the evidence the plaintiff is not entitled to recover."

"3. On all the evidence the plaintiff is not entitled to recover under the second count of his declaration." [The second count alleged as the cause of action negligence of a superintendent.]

"6. On all the evidence the plaintiff is not entitled to recover by virtue of the employers' liability act."

"15. The employer is not answerable for the negligence of Murray, if, at the time and in doing the act complained of, he was not exercising superintendence but was engaged in mere manual labor.

"16. Unless the act of Murray is one of direction or of oversight, tending to control others and to vary their situation or action because of his direction, the defendant is not responsible.

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"17. The act of Murray in placing the boards in question under the ladder in question, being a mere act of manual labor, is not an act of superintendence.

"18. Murray's act, in suffering and permitting the boards in question to remain under the ladder in question was not an act of superintendence.

"19. Murray's failure to warn the plaintiff under the circumstances that the boards had been placed under the ladder was not an act of superintendence.

"20. Murray's exposing the plaintiff to any danger resulting from the arrangement of the ladder with the boards thereunder, was not an act of superintendence."

The jury found for the plaintiff in the sum of $4,000; and the defendant alleged exceptions, which, after the resignation of *Sherman*, J., were allowed by *Pierce*, J.

E. C. Stone, for the defendant.

C. H. Donahue, (*H. W. Hardy* with him,) for the plaintiff.

DECOURCY, J. The controlling question in this case is whether the plaintiff's fall was caused by the negligence of the superintendent Murray while exercising superintendence. The evidence tended to establish the following facts. On the day of the accident and on the day before, a ladder ten or twelve feet long was used by the plaintiff in going between the main roof and the monitor roof of the defendant's electrical building, a distance of about seven feet. He had placed it in a secure position, with the foot of the ladder two or three feet from the base of the monitor and its iron spurs implanted in the tar of the main roof. While the plaintiff was working upon the roof of an adjoining building Murray, who was conceded to be a superintendent within the meaning of the employers' liability act, placed under the spurs of the ladder two pieces of smooth board about three inches in width, one of them a foot and the other three or four feet in length. Shortly afterwards the plaintiff, unaware of what Murray had done, started down the ladder, when it slid out from the bottom and he fell with it, thereby sustaining the injuries complained of. It was admitted that due notice was given as required by the statute. The verdict was on the second count, alleging negligence of the defendant's superintendent.

The defendant contends that there was no evidence that Murray

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did anything carelessly, and that, even if he did, the act was one of mere manual labor and not one of superintendence. It concedes that the jury would be warranted in finding that the boards were placed under the ladder by Murray, but argues that there was no evidence that he placed them there carelessly. The plaintiff's complaint, however, during the trial and in this court, was not that the ladder or boards were defective, or that Murray was careless in the mere manual act of inserting the boards, but that the plan of resting a ladder on unsecured boards upon a sloping gravel roof was an improper and negligent arrangement. The record makes it apparent that the proper performance of the manual act of placing the boards under the ladder was not an issue in the trial. And it is evident from the charge that the question submitted to the jury, "Was John S. Murray, the superintendent, guilty of negligence," referred only to the adoption by him of an alleged dangerous plan. The judge said to the jury: "Now the claim is by this plaintiff that because he put two boards under the ladder, leaving it exactly the same in every other way, that that caused it to slip out from the bottom; . . . that is the nub of this case." And he instructed them that if Murray, by placing boards under the ladder instead of having it rest on the roof, did what the ordinarily prudent man would do, he was not guilty of negligence; but that if such was not the usual and proper way to place a ladder, or if Murray with his experience and knowledge ought to have anticipated that a ladder so placed would fall, then he might be found guilty of negligence. And no exception was taken to the charge by the defendant.

The jury specially found, and were warranted by the evidence in finding, that the plaintiff was in the exercise of due care, that the ladder did slip or slide out from the bottom while the plaintiff was on it, and that Murray the superintendent was guilty of negligence; and they also assessed the plaintiff's damages. The judge submitted the special questions to counsel before he instructed the jury upon them, and no objection was made to this method of dealing specifically with the issues in the case. Upon the answers returned by the jury the plaintiff was entitled to the verdict which the court directed.

We now deal with the defendant's requests for rulings. It is clear that the court could not give the first, third or sixth, each

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to the effect that on the evidence the plaintiff was not entitled to recover as matter of law. There was evidence for the jury of the plaintiff's due care and of negligence on the part of the defendant. The requests numbered 15, 16 and 17, calling attention to the non-liability of the defendant for mere manual acts of Murray, were not called for upon the issue actually tried, as hereinbefore explained. The only negligence of the superintendent relied upon by the plaintiff and submitted to the jury was that involved in Murray's determination to secure the ladder in place by putting loose boards under it, an alleged unsafe arrangement, and not in any careless act in the execution of that arrangement. If the accident was due to the careless adoption by the superintendent of an unsafe plan for holding the ladder immovable, the defendant is equally liable whether the manual work is performed by the superintendent himself or by a fellow workman ordered by the superintendent to perform it. *Kushnizki* v. *New England Biscuit Co.* 210 Mass. 177, and cases cited.

The requests numbered 18, 19 and 20 were rightly refused. The proximate cause of the injury was not merely the permitting of the boards to remain under the ladder, nor solely the exposing of the plaintiff to the danger resulting therefrom, but the determination that this plan of holding the ladder in position should be adopted, and the carrying out of the arrangement without giving warning to the plaintiff of its danger. Under the circumstances the duty to warn became a part of the duty of superintendence. *Mooney* v. *Benjamin F. Smith Co.* 205 Mass. 270.

There remains to be considered a question of evidence. The writ, declaration and record of proceedings in an action for the same injuries, brought on behalf of the plaintiff in the municipal court and discontinued before the date of the present action, were offered by the defendant and excluded. The writ was offered for the purpose of showing the amount claimed for damages in the former action; and the argument is urged that it was an admission against interest. But there was no offer of evidence that the plaintiff was consulted by his attorney in fixing the *ad damnum*, or that he even knew what amount was inserted in the writ. As the evidence was not competent as an admission it is unnecessary to decide whether R. L. c. 173, § 85, providing that "pleadings shall not be evidence on the trial," is applicable. The exception to the exclusion

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of the declaration was waived. The certified copy of the proceedings was immaterial. The plaintiff had a right in the former case to vacate the judgment in favor of the defendant by an appeal to the Superior Court, and to discontinue the action later. *Derick* v. *Taylor*, 171 Mass. 444. *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98. The jury would not be aided and might be prejudiced against the plaintiff by learning what disposition was made of the earlier case in the lower court. They could properly decide this action only upon the law and the evidence presented to them.

Exceptions overruled.

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d 212 - 391 COMMONWEALTH *vs.* HARRY MARSHALL & another.

Plymouth. January 15, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Criminal, Brief before full court. *Rules of Court. Supreme Judicial Court. Homicide. Evidence. Witness.*

The "concise statement of the case," with which Rule 2 of the rules for the regulation of practice before the full court requires that each brief filed shall begin, is a concise statement of the case shown by the printed record, and therefore it is improper for a brief for the Commonwealth, filed for the argument of exceptions of a defendant taken at the trial of an indictment for murder, to have included in it a statement of the view of the district attorney as to the case developed at the trial rather than a statement of the case presented by the bill of exceptions. In the present case a motion of the defendant to strike such a brief from the files and record was denied, but the court stated that in passing upon the case the statement contained in the brief was wholly disregarded.

At the trial of an indictment for murder there were issues of the identification of a body of a man as that of the deceased and of a patchwork quilt found wrapped around it as one formerly in the home of the deceased. A witness for the Commonwealth testified that he saw the body shortly after it was found and that the quilt "was the quilt, or just like the quilt" which he had seen the deceased take to his home from the home of the witness. In cross-examination, in answer to questions seeking to show that the witness was testifying under the influence of a police officer in charge of the case for the Commonwealth, the witness stated that, when questioned by the officer about two weeks after the finding of the body, he merely had shaken his head. Subject to exceptions of the defendant he was allowed to testify in redirect examination, and his father and mother were allowed to corroborate him, that shortly after seeing

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the body with the quilt he had stated to his father that the quilt was like that taken from his home "and they may bring you up for the murder." *Held*, that there was no error in the admission of the evidence of the previous statements to corroborate the witness, following *Commonwealth* v. *Tucker*, 189 Mass. 457, 479 *et seq.*

At the trial of an indictment against a man and a woman for the murder of the woman's husband, the Commonwealth offered as a witness a daughter of the murdered man and of the woman defendant, who was between nine and ten years of age and did not understand the English language. Examined by the presiding judge through an interpreter she stated that she knew what it was to take an oath and that she had been to church. In answer to the question, "Did you learn about God?" she shook her head in the negative. In answer to the question, "If you don't tell the truth, what do you think will be done to you?" she answered, "God will punish us and send us to hell." The presiding judge allowed the witness to testify. *Held*, that there was no error shown in the action of the presiding judge.

INDICTMENT, found and returned on October 3, 1910, charging the defendants jointly with the murder of Francisco, otherwise known as Frank, Cusumano at Hull on September 18, 1910.

In the Superior Court the case was tried before *Schofield*, J.

The bill of exceptions stated that at the trial the Commonwealth "introduced evidence tending to show, that Frank Cusumano was killed in his own house, with an axe, by the defendant Harry Marshall, on the eighteenth day of September, 1910, and that the defendant Lena Cusumano, by previous understanding and procurement, was present and assisted in the commission of the act. All of which was contradicted by and in behalf of the defendants."

It appeared that a badly mutilated body of a man which witnesses for the Commonwealth testified was that of Frank Cusumano was found on October 14, 1910, at Sunset Point in Hull about three fourths of a mile from the Cusumano home. There was no clothing upon the body except a patchwork quilt, which was fastened around it underneath the arms with telephone wire. The quilt was made of small patchwork pieces of different colors and lined with blue cloth. The Commonwealth introduced evidence tending to show that the quilt was one which formerly had been lying in the back yard of one Martin C. Jacobson, and which Frank Cusumano had taken away from there on a team driven by Walter Jacobson, a son of Martin, and that it had been on a bed in the Cusumano home before the murder. The defendants denied that the body found was that of Frank Cusumano and also that the

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quilt had ever been in the possession of Frank Cusumano or of the defendant Lena.

Walter Jacobson, between fifteen and sixteen years of age, testified that he was present at Sunset Point after the body was found and that he noticed the quilt; that "it was the quilt, or just like the quilt," which Frank Cusumano had taken from his father's back yard to his own home. In cross-examination in reply to inquiries made by the defendants, "in an effort to show with other things that the witness was then testifying under the influence of" the police officer who was in charge of the case and was present in the court room, the witness stated that the officer had talked with him about the quilt and had shown it to him about two weeks after the body was found and had asked him about it, and that all he did was to shake his head. He also testified in cross-examination that it did not occur to him until he was walking home from having seen the body that the quilt was the same that he had seen Frank Cusumano take from his father's back yard. On redirect examination, subject to exceptions by the defendants, he was allowed to testify "that after seeing the body and quilt on the beach, and before Reynolds [the police officer] talked with him, he went home to dinner and said to his father, in his step-mother's presence, 'The quilt that was lying near the body was like the quilt which lay on the ties, and they may bring you up for the murder.'" Martin C. Jacobson then was recalled and was allowed to testify, against the defendants' objection, that upon the day of the finding of the body after he and Walter came home and sat down to dinner, Walter said, "Why, pa, that quilt came from our place, and if they find it out they will say you killed Frank;" and the step-mother, Elizabeth Jacobson, against the defendants' objection was allowed to testify to the same conversation, which she gave in the following language: "Walter said, 'Pa, that is the quilt that was in our yard. If it is Frank they might say you killed him.'"

It appeared that Frank and Lena Cusumano had three children, the oldest of whom was between nine and ten years of age, Accusia Cusumano. She was called to testify by the Commonwealth. Before she was sworn, the defendants' counsel stated, "I think she should be examined as to whether or not she knows the nature of an oath." Questioned by the presiding judge in English out of the

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hearing of the jury, the witness stated that she could not talk English, and showed that she understood but little. The following examination through an interpreter then occurred: "Q. [Through interpreter.] When were you nine years old? A. Last month. — Q. What day of the month? A. No. — Q. How many brothers and sisters have you? A. Two sisters. — Q. How old are they? A. I don't know. — Q. Do you know what it is to take an oath? [The interpreter raised his hand when this question was asked.] A. [Witness nodded.] Q. Have you ever been to church? A. When I was in Boston, yes. — Q. How long did you go to church? A. All the Sundays. — Q. Did you learn about God? A. [Witness shook her head in the negative.] — Q. If you don't tell the truth, what do you think will be done to you? A. God will punish us and send us to hell." The witness then was sworn and gave testimony material to the case of the Commonwealth.

The jury found both defendants guilty of murder in the first degree; and the defendants alleged exceptions.

W. J. Coughlan & T. J. Grady, for the defendants.

A. F. Barker, District Attorney, (*F. G. Katzmann*, Assistant District Attorney, with him,) for the Commonwealth.

SHELDON, J. The defendants' motion, made at the argument in this court, to strike from the files and record the brief of the Commonwealth, cannot be allowed. But the statement of the case contained in that brief was not a proper one. It was the view of the district attorney as to the case developed at the trial rather than a statement of the case presented by the bill of exceptions. That bill of course stated only such part of the proceedings had at the trial as were needed to present properly to us the questions of law which were intended to be brought up. The concise statement of the case with which it is required by Rule 2 for the regulation of practice before the full court that each brief shall begin, means a concise statement of the case shown by the bill of exceptions. Nothing more should be included; and the brief of the Commonwealth should not have gone further. Accordingly in passing upon the case we have wholly disregarded the statement contained in that brief.

The first contention of the defendants is that testimony of the statements of Walter Jacobson made out of court shortly after the alleged crime had been committed should not have been admitted.

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This contention cannot be supported. It was claimed by the defendants that the witness was testifying under the influence of a policeman, and that before coming under this influence the witness had not observed the fact, the identity of a quilt, to which he testified. To meet this claim of the defendants, the judge might allow it to be shown that immediately after seeing the quilt and before meeting the policeman the witness had made the same statements to which he now testified. The subject was fully discussed by Hammond, J., in *Commonwealth* v. *Tucker*, 189 Mass. 457, 479, *et seq.*, and we need add nothing to what was there said.

There was no exception to the judge's preliminary examination of the witness Accusia Cusumano outside of the hearing of the jury. The examination was made at the request of the defendants' counsel, and there is nothing to show that it was not made in the manner that they desired, or that the defendants were in any way prejudiced by the method adopted.

We find no error in the action of the judge in allowing this witness to testify. It was for him to decide upon her competency; his decision will not be overruled unless some error is shown; and that is not the case here. *Commonwealth* v. *Mullins*, 2 Allen, 295. *Commonwealth* v. *Lynes*, 142 Mass. 577. *Commonwealth* v. *Robinson*, 165 Mass. 426. *Commonwealth* v. *Reagan*, 175 Mass. 335. *Commonwealth* v. *Ramage*, 177 Mass. 349.

The other exceptions taken by the defendants were expressly waived. As this is a capital case, we have examined them, and are satisfied that none of them could have been sustained.

Exceptions overruled.

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JOSEPHINE K. MATHESON *vs.* JOSEPH O'KANE.

Suffolk. January 16, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Joint Tortfeasors. Covenant, Not to sue. *Release. Accord and Satisfaction. Practice, Civil,* Discontinuance.

In an action of tort against three joint tortfeasors, covenants not to sue given by the plaintiff to two of the defendants do not release the third defendant from liability.

In an action of tort for personal injuries against three defendants sued as joint tortfeasors, where it appears that covenants not to sue have been given by the plaintiff to two of the defendants upon the receipt of certain sums of money from them, the question whether the plaintiff accepted the money so paid in full satisfaction of all injuries caused by the accident is one of fact for the jury on the evidence presented.

In an action of tort against three alleged joint tortfeasors, the plaintiff's discontinuance of the action as against two of them does not affect the liability of the third.

TORT, originally against Frank T. Horgan, Edward B. Townsend, trustee, and Joseph O'Kane, jointly, for personal injuries sustained by the plaintiff on February 2, 1909, from a fall caused by an accumulation of ice on the sidewalk of East Canton Street in Boston, the declaration alleging that the defendants were severally the owners of the houses, numbered 7, 9, and 11 on East Canton Street, and that the accumulation of ice on which the plaintiff fell was due to the freezing of water overflowing from the gutter maintained along the eaves of the three houses and the conductor leading therefrom, by reason of the negligence of the defendants in failing to keep such gutter and conductor in repair. The declaration also alleged that due notice of the time, place and cause of the injury was given to each of the defendants. Writ dated February 13, 1909.

Each of the defendants filed an answer consisting of a general denial.

Later the plaintiff filed discontinuances against the defendants Horgan and Townsend, trustee. The defendant O'Kane before the trial filed an amended answer alleging that since the commence-

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ment of the action the plaintiff had accepted and received from the defendants Townsend and Horgan certain sums of money and other valuable things in full accord and satisfaction for her injury and cause of action and had discontinued her action against them, and that such acceptance in accord and satisfaction was a bar to the action against the defendant O'Kane, also, that the plaintiff had given to the defendants Townsend and Horgan releases from all liability on account of the plaintiff's injury and cause of action, which were a bar to the action against the defendant O'Kane.

In the Superior Court the case was tried before *Brown*, J., against the defendant O'Kane alone. There was evidence of the happening of the accident as alleged in the declaration. It appeared that the plaintiff had received from certain insurance companies in which the defendants Horgan and Townsend, trustee, were insured against such accidents, respectively the sums of $300 and $200 and thereupon gave to the insurance companies as representing the defendants Horgan and Townsend, trustee, instruments under seal, executed by her, which were exactly similar in form except in the respective names of those defendants, the amounts of the consideration, and the dates of execution, the instrument given by the plaintiff to the insurance company representing the defendant Townsend, trustee, being as follows: "Know all men by these presents that I, Josephine K. Matheson of Boston in the County of Suffolk and Commonwealth of Massachusetts, in consideration of the sum of Two Hundred ($200) Dollars and other valuable considerations, to me duly paid, do hereby covenant with Edward B. Townsend, Trustee, that I will never sue or attach the said Townsend, Trustee, or his estate, for or on account of a certain claim for damages described in the plaintiff's declaration in a certain action brought by her against the said Townsend, Trustee, and others, in the Superior Court, for the County of Suffolk, which action is numbered 51303, and that these presents may be pleaded as a defence to any action or other proceeding which may be brought, instituted or taken by me against the said Townsend, Trustee, or his estate, in breach of this covenant. In witness whereof I have hereunto set my hand and seal this twenty-fifth day of August, A. D. 1909." At the time she gave this instrument and received the sum of $200 the plaintiff discontinued the action as against the defendant Townsend, trustee, and, on

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giving the similar instrument running to the defendant Horgan and receiving the sum of $300, she also discontinued the action as against that defendant.

At the close of all the evidence the defendant O'Kane moved that the jury be instructed to return a verdict for the defendant on the ground that the giving of the papers to the defendants Horgan and Townsend, trustee, and the receipt of the money constituted a bar to any recovery against the defendant O'Kane.

The judge ruled that, as the plaintiff's claim was unliquidated, the taking of money and the giving of the papers under seal to the defendants Horgan and Townsend, trustee, was a bar to any recovery against the defendant O'Kane. He ordered the jury to return a verdict for the defendant, and by request of the parties reported the case for determination by this court. If his ruling was correct, judgment was to be entered for the defendant. If his ruling was not correct, the case was to be remanded for a new trial.

H. L. Boutwell, (*W. H. Hastings* with him,) for the plaintiff.

D. E. Hall, (*C. F. Dolan* with him,) for the defendant O'Kane.

DeCourcy, J. The judge of the Superior Court ruled that as the plaintiff's claim was unliquidated the taking of money and the giving of the papers under seal to the defendants Horgan and Townsend, trustee, was a bar to any recovery against the defendant O'Kane. The correctness of this ruling is now presented for our determination.

The long established doctrine, that a release of one of several joint tortfeasors operates to discharge all, is not applicable here because no release was given by the plaintiff. Bac. Abr. Release (B). *Brown* v. *Cambridge*, 3 Allen, 474. *Aldrich* v. *Parnell*, 147 Mass. 409. It is equally true that a satisfaction from one discharges all, as the plaintiff has only a single cause of action and is entitled to but one satisfaction in damages. *Cocke* v. *Jennor*, Hob. 66. *Brewer* v. *Casey*, 196 Mass. 384. The point argued by the defendant, however, that the plaintiff accepted the money from the other defendants in full satisfaction for her injuries and thereby discharged her cause of action, does not seem to be raised by the report. The ruling made does not refer to such alleged accord and satisfaction. And when the plaintiff attempted to show that there was no intention to release her claim, the judge excluded the evidence, not on account of the form of the question

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objected to, but on the broad ground that "the paper speaks for itself." Even if we assume that this contention is fairly open to the defendant, the question whether the plaintiff accepted the money from the other defendants in full satisfaction of all injuries caused by the accident was one of fact for the jury on the evidence.

The main question in this case is whether the covenants not to sue, given by the plaintiff to two of the three joint tortfeasors, operate as a defense in favor of the defendant O'Kane, who was not a party to the covenants and contributed no part of the consideration therefor. The point in dispute never has been decided in this Commonwealth.

The rule of law that a release which discharges the liability of one joint tortfeasor releases the others seems to be based upon the nature of their liability, which is one and indivisible and is necessarily destroyed by the discharge of one. In like manner after satisfaction, although it moved from only one of the wrongdoers, no foundation remains for an action against any one. 11 Ann. Cas. 397, note. 25 Harvard Law Rev. 203.

This basis for the rule does not exist in the case of a covenant not to sue one of several jointly liable. Here the liability is not discharged, and the plaintiff's right of action is retained against all the wrongdoers. For a breach of his covenant not to sue he becomes liable for the damages suffered by the one to whom the covenant was given. It is true that a covenant not to sue an individual debtor may be pleaded in bar to the original cause of action. But this exception was early established in order to avoid circuity of action, as otherwise the court would be burdened with cross actions for the same damages, one on the original liability and the other on the covenant not to sue. *Hodges* v. *Smith*, Cro. Eliz. 623. *Lacy* v. *Kynaston*, 12 Mod. 548. *Foster* v. *Purdy*, 5 Met. 442.

The great weight of authority supports the doctrine that a covenant not to sue one of several joint tortfeasors does not operate as a release of the others from liability. *Texarkana Telephone Co.* v. *Pemberton*, 86 Ark. 329. *Chicago* v. *Babcock*, 143 Ill. 358. *Chicago & Alton Railway* v. *Averill*, 224 Ill. 516. *Drinkwater* v. *Jordan*, 46 Maine, 432. *Musolf* v. *Duluth Edison Electric Co.* 108 Minn. 369. *Arnett* v. *Missouri Pacific Railway*, 64 Mo. App. 368. *Snow* v. *Chandler*, 10 N. H. 92. *Line & Nelson* v. *Nelson & Smalley*,

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9 Vroom, 358. *Irvine* v. *Milbank*, 56 N. Y. 635; 15 Abb. Pr. (N. S.) 378. *Robertson* v. *Trammell*, 98 Texas, 364. *Bloss* v. *Plymale*, 3 W. Va. 393. *Ellis* v. *Esson*, 50 Wis. 138. This distinction between a release and a covenant not to sue has long been recognized in this Commonwealth in actions of contract. *Shed* v. *Pierce*, 17 Mass. 622. *Draper* v. *Weld*, 13 Gray, 580, 585. *Kenworthy* v. *Sawyer*, 125 Mass. 28. Generally speaking, it would seem that in this respect the same principle should apply alike to actions *ex contractu* and those *ex delicto*, and some of the courts have expressly so held. *Duck* v. *Mayeu*, [1892] 2 Q. B. 511. *Snow* v. *Chandler*, 10 N. H. 92.

The confusion and apparent conflict of authorities has not arisen in cases like that at bar, where the agreement given to one of the joint wrongdoers is clearly an agreement not to sue and nothing more. The distinction between the legal effect of a release and of a covenant not to sue is generally recognized. The controversy concerns rather the construction of a particular writing as a release or as a covenant not to sue, and the means whereby the two are to be distinguished. Where it is apparent from the paper that the intention was to discharge the liability of one of the joint wrongdoers, the courts quite generally hold that the original joint and indivisible liability is thereby extinguished, and that any clause by which parties seek to reserve a right of action against the other wrongdoers is repugnant to the release and void. *Ducey* v. *Patterson*, 11 Ann. Cas. 393, note. *Gunther* v. *Lee*, 45 Md. 60. *McBride* v. *Scott*, 132 Mich. 176. *Seither* v. *Philadelphia Traction Co.* 125 Penn. St. 397. *Abb* v. *Northern Pacific Railway*, 28 Wash. 428. But where it is evident that the consideration paid to the plaintiff was not intended to be full compensation for his injuries, and the agreement signed by him although in form a release was clearly intended to preserve the liability of those who were not parties to it, many of the courts have sought to give effect to that intention by construing the agreement as in legal effect a covenant not to sue and not a technical release. As stated by A. L. Smith, L. J., in *Duck* v. *Mayeu*, [1892] 2 Q. B. 511, 514: "A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price* v. *Barker* (4 El. & Bl. 760, at p. 777), where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out,

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and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release." And see *Edens* v. *Fletcher*, 79 Kans. 139; *McAllester* v. *Sprague*, 34 Maine, 296; *Gilbert* v. *Finch*, 173 N. Y. 455; *Bloss* v. *Plymale*, 3 W. Va. 393; *Ellis* v. *Esson*, 50 Wis. 138; *Carey* v. *Bilby*, 129 Fed. Rep. 203. The lack of harmony in the cases is partly due also to distinctions sometimes drawn between the effect of a release under seal and one not under seal; and between settlements made where the damages are certain or subject to computation, and where they are uncertain and a mere matter of opinion. But we are not concerned with this controversy in the present case, as the writings given by this plaintiff were admittedly nothing more than agreements not to sue.

The discontinuance of the action against the other defendants in itself does not affect the liability of the defendant O'Kane. The plaintiff at her election might have sued one or two or all of the tortfeasors. The discontinuance simply placed Horgan and Townsend in the same position they occupied before the litigation began. *Sloan* v. *Herrick*, 49 Vt. 327. *Bloss* v. *Plymale*, 3 W. Va. 393; 58 L. R. A. 303, cases collected in note.

We are of opinion that the covenants not to sue given in this case do not constitute a bar to the plaintiff's claim against the defendant O'Kane, and that the issue of accord and satisfaction was one of fact for the jury. Accordingly the judge was not warranted in directing a verdict for the defendant as matter of law. We deem it unnecessary to consider the question of evidence raised, as it is not likely to arise at another trial.

New trial ordered.

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ALEXANDER R. MURDOCK *vs.* PAINE FURNITURE COMPANY.

Suffolk. January 16, 1912. — February 27, 1912. 213 - 232

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

At the trial of an action at common law by an employee against his employer to recover for personal injuries due to the plaintiff's leg coming in contact with a nail which projected half an inch from the end of a mahogany board protruding six or eight inches into a passageway between piles of lumber along which the plaintiff was passing in assisting his employer to take account of stock, it appeared that the plaintiff was an experienced workman and at one time had been a foreman in the room where the alleged injury was received, that in taking account of stock it was necessary for two men to move each board from one pile to another, that mahogany boards had cleats nailed across their ends to prevent them from splitting and that the plaintiff knew that such cleats frequently were knocked off leaving nails exposed. *Held*, that the plaintiff could not recover, because the alleged injury was due to an obvious risk of the employer's business which the plaintiff had assumed; and because there was no evidence of negligence of the employer.

MORTON, J. This is an action of tort at common law to recover for injuries received by the plaintiff on January 31, 1907, while in the defendant's employ. The Chief Justice of the Superior Court ordered a verdict for the defendant and reported the case.

The defendant had been engaged in taking stock for two or three days. The plaintiff was assisting in this work, and while so assisting was injured by his leg coming in contact with a nail in the end of a board projecting six or eight inches into the passageway between the piles of lumber. The nail projected from the end of the board about half an inch. The board that caused the injury was in a pile of mahogany lumber. In taking account of stock it was necessary to get the number of feet in each board, and in doing that each board was lifted off the pile where it was on to another pile and when the number of feet in the pile had thus been ascertained the pile was put back again into its former position. This work was done by two men, one at each end of the pile. It was intended in piling the boards to have the ends next to the passageway even. The mahogany boards had strips or cleats nailed across the ends with inch and a half wire nails to keep them

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from splitting. It appeared that it was a common thing for these strips or cleats to get knocked off, and that the plaintiff knew it, and that the one on the board in question had been knocked off,— it did not appear when or how. The plaintiff testified that there were four nails left in the board and that he drew them out without saying anything to any one. The plaintiff was an experienced workman and had formerly worked in the same room as foreman, but had left the defendant's employ, returning in January, 1904, and working ever since under another person as foreman in the same room where the accident occurred.

The plaintiff testified that he never before had seen a board projecting into the passageway. But it is obvious that it was a thing that was liable to happen in the ordinary work of piling lumber, and if so it must be regarded, we think, like the knocking off of the cleat leaving projecting nails, as one of the risks of the business which the plaintiff assumed. It is difficult also to see how there was any negligence on the part of the defendant. It would have been idle to instruct the plaintiff in regard to a matter which, judging from his experience, he would be as likely to know about as any one. And still further, the risk might well be deemed to have been one of those transitory risks in regard to which the employer owes no duty of inspection to his employees and may properly rely upon them to look out for themselves. See *Whittaker* v. *Bent*, 167 Mass. 588; *McCann* v. *Kennedy*, 167 Mass. 23; *Campbell* v. *Dearborn*, 175 Mass. 183.

Judgment on the verdict for the defendant.

James J. McCarthy, for the plaintiff.

W. H. Hitchcock, (*W. L. Allen* with him,) for the defendant.

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REBECCA GLASS *vs.* HAZEN CONFECTIONERY COMPANY.

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Suffolk. January 17, 1912. — February 27, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability. *Practice, Civil*, Question for the jury, Conduct of trial: judge's charge, requests and rulings, Exceptions. *Agency*, Scope of authority. *Evidence*, Opinion: experts.

At the trial of an action at common law against the proprietor of a candy factory for personal injuries suffered by the plaintiff while an employee therein and at work in front of a caramel cutting machine, it appeared that the machine had an endless canvas carrier belt or apron revolving in a horizontal plane on rollers, that trays of uncut caramel were placed upon the carrier belt and by it were carried under knives revolving above it, which cut the candy. There was evidence that the canvas belt had become loose, that in such a condition it slipped upon the rollers and did not move so fast, and that, if pressed down, it would jump suddenly forward to the full speed of the rollers and the hand of one so pressing it was in danger of being drawn upon the knives; that without instruction or warning as to the machine's defective condition, the plaintiff, who was inexperienced, was set at work at it and was told merely to watch the candy as it went under the knives and to keep it straight, that in attempting to do as she was told she pressed down on the carrier belt, her hand was drawn in, and she was injured. *Held*, that it could not be said as matter of law that the risk of the injury which the plaintiff suffered was so obvious as to have been assumed by her; and that the questions, whether the plaintiff when injured was in the exercise of due care and whether the defendant had failed in the duties of furnishing a reasonably safe machine and of properly instructing and warning the plaintiff as to hidden dangers and defects in the machine, were for the jury.

It is within the discretionary power of a judge presiding at a trial to read to the jury after the close of the charge a ruling which he previously had been asked to give; and there can be no exception to the exercise of that discretion, especially when, before reading the ruling, he states in substance that, in reading it, he did not want the jury to understand that he intended "to call specific attention to any particular portion of the case so as to give it an undue prominence."

TORT at common law for personal injuries sustained by the plaintiff while in the employ of the defendant at its candy factory, as stated in the opinion. Writ dated May 6, 1908.

In the Superior Court the case was tried before *Dana*, J. The facts in evidence are stated in the opinion.

The testimony of experts, referred to in the last paragraph of the opinion, which was admitted subject to exceptions by the defend-

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ant, was as follows: One Fairbairn, an expert testifying for the plaintiff, was asked in direct examination, "Assuming that this machine here is a candy cutting machine with nothing on the apron at all, and that caramel candy is to be cut into lengths on that machine, by placing that caramel candy on trays on the front end of the machine, what, if anything would be reasonably necessary to insure safety in the use of that machine?" He answered, "A safety guard." One Gillis, a witness for the defendant, was asked in cross-examination, "It is perfectly practicable, is it not, to have a guard across, — a stiff guard across from upright to upright in front of these knives?" He answered, "It is."

At the close of the evidence, the defendant asked the presiding judge to rule that, on all the evidence the plaintiff was not entitled to recover, and as follows:

"(6) The danger of having her hand caught under the revolving knives even if she were not set to work upon the machine, was an obvious one. The mere fact that the plaintiff could not tell the exact degree of danger if the nature of it can be readily seen is not enough to require warning and instruction to a person of the plaintiff's intelligence."

"(10) There is no evidence of any defect in the condition of the caramel cutter.

"(11) There is no evidence of any hidden or concealed danger in the operation of the machine.

"(12) The tendency of a canvas belt to increase its speed in passing over a revolving roller when the belt is pressed down is obvious to any person of average intelligence.

"(13) In view of the length of time the plaintiff had been at work in the vicinity of the caramel cutter she must be assumed to have been familiar with the dangers incident to its operation.

"(14) It appears on all the evidence that the plaintiff's regular occupation was to put the candies into trays, and the defendant had no reason to suppose that she would ever attempt to operate the machine, and was therefore under no duty to warn her of dangers incident to its operation.

"(15) Even if the plaintiff's testimony that McDonald left the machine and told her to see that the candy then on the machine went straight is believed, she cannot recover; for the proximate cause of the accident was the negligence of a fellow servant.

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"(16) The defendant is not liable, if McDonald told the plaintiff to watch and see that the candy then on the machine went straight. The plaintiff was not hired to do this work and was acting outside the scope of her employment, even if induced to do so by the direction of a fellow servant.

"(17) The defendant did not set the plaintiff to work upon the machine and is not liable for the act of a fellow servant of the plaintiff in directing her temporarily to act as his substitute."

The rulings were refused.

The presiding judge, subject to an exception by the defendant, left it to the jury to determine whether the Mrs. Talbot referred to in the opinion had such authority as would justify her in authorizing the plaintiff to obey orders of McDonald.

That part of the charge, referred to in the opinion, which referred to a guard upon the machine, was in substance as follows: "On the question of the machine being an unsuitable machine to be furnished to the plaintiff, and on the necessity of a guard, the law is as follows: The defendant is bound to furnish suitable machines. The defendant is not bound to furnish any particular kind of machinery, or the best, or the safest; but the defendant is bound to use reasonable care to provide a suitable machine; and, in this case, if this plaintiff had been warned of this danger, or told of this defect, the defendant had the right to use this machine, and would not be bound to use some other or different machine, even if that machine would be safer; but, if the defendant chose to use this machine, then, on the question of whether the machine was defective or not, if the plaintiff did not know of the danger or defect, that is to say, the danger or defect was hidden, then there would be a duty on the part of the defendant, if the defect or danger was not obvious, to furnish a machine that on the whole was reasonably safe; . . . Of course, if the risk or danger was obvious, there was not any liability on the part of the defendant; and, if the danger or defect was hidden within the definition that I have given, then there was the duty on the part of the defendant either to give a warning of the defect or danger, or else to see to it that the machine furnished was reasonably suitable under all the circumstances for the purpose for which it was furnished."

At the close of the charge the presiding judge read to the jury a ruling as to damages which the plaintiff previously had asked

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for, stating to them before doing so, "in reading this I do not want you to understand that I intend to call specific attention to any particular portion of the case so as to give it an undue prominence."

The jury found for the plaintiff in the sum of $8,000, of which amount the plaintiff remitted $2,000 in accordance with an order of the presiding judge directing that she should do so, or that there should be a new trial. The defendant alleged exceptions.

E. K. Arnold, (*S. H. Batchelder* with him,) for the defendant.

E. C. Stone, (*J. Michelman* with him,) for the plaintiff.

DeCourcy, J. The plaintiff, an employee of the defendant, was injured by the revolving knives of a caramel cutting machine. The parts of the machine involved in the case are an endless canvas belt or apron revolving in a horizontal plane, two rolls or rollers which move the apron by friction, and the series of circular parallel knives rotating above the apron. When the power is applied the operator places on the moving apron a tray containing a batch of caramel, and the candy thus carried is cut into strips the first time and into squares the second time it passes beneath the knives. At the time of the accident the plaintiff was at the front end of the machine, and in attempting to make the candy go through the machine straight she pressed her hand down upon the tray, whereupon the hand was thrown forward and under the knives.

The case was submitted to the jury on two common law counts, the first alleging that the defendant set her at work upon dangerous machinery without giving her sufficient instruction, the second alleging that she was set at work upon dangerous machinery that was in a defective condition. The case is here upon the defendant's exceptions to the refusal of the presiding judge to give certain rulings, also to portions of the charge and to the admission of certain evidence.

The legal duty owed by the defendant to the plaintiff with reference to the facts connected with the accident is determined by the preliminary issue: Was the plaintiff acting in the course of her employment when working on the front of the machine, or did she undertake this work as a volunteer, without the defendant's consent and in disregard of the warnings of others? Upon this question there was evidence to warrant the jury in finding that when the plaintiff applied to the defendant's superintendent for

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work she was referred to Mrs. Talbot, the "forelady having charge of the girls;" that Mrs. Talbot had authority to order the plaintiff what to do; that she had taken the plaintiff to this machine, directed her to work with one McDonald who operated it, and said to the plaintiff, "You should mind him and he will tell you what to do;" and that shortly before the accident McDonald called her from her place at the back of the machine to the front and directed her to watch the candy as it went under the knives and to keep it straight. It is not our province to consider the weight of the evidence submitted by the defendant to contradict the plaintiff's version and which the jury were not bound to accept. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314, 323. The jury found, and were warranted by the evidence in finding that the plaintiff was set at work at the front end of the machine by some person authorized by the defendant to place her there. *Grace* v. *United Society called Shakers*, 203 Mass. 355. Cases like *O'Brien* v. *Rideout*, 161 Mass. 170, and *Grebenstein* v. *Stone & Webster Engineering Corp.* 205 Mass. 431, where the plaintiff was set at work in a dangerous place by an unauthorized fellow servant, do not apply.

When the defendant, through McDonald, placed the plaintiff at work on the front of this machine, it became its duty to give her suitable instructions. As it could not delegate this duty to any one else it is liable to the plaintiff if her injury was due to the failure to give her such instructions; and it does not claim to have given her any information or caution upon the subject, contending that it never set her at work on the front of the machine.

The defendant further contends that, even if the plaintiff was set at work without instruction, it is not liable because the danger from which the plaintiff suffered was one of which she assumed the risk. This would be true if the danger complained of were an obvious one, such as would be encountered if she permitted her hand to remain upon the moving tray or apron, as manifestly it would be carried into the knives. But the danger of which the plaintiff complains, and one upon which the case was tried, is the liability, when the belt has become loose, of having the hand thrown forward into the knives when it is momentarily pressed upon the moving belt, as in the act of guiding the tray. Such a perilous condition is due to the fact that when the belt is loose it will not

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move so fast as the rolls; and if one then presses down upon the belt the friction between it and the rolls will be increased and the belt at once will be brought up to their speed. The quickness or jerk in the increase of the speed depends largely upon the degree of looseness of the belt. It cannot be said as matter of law that this danger of the workman's hand being thrown forward when pressure tightens a loose belt is an obvious one. It is not apparent to the eye of the inexperienced workman, but is hidden and obscure until disclosed by explanation or experience. *Wheeler* v. *Wason Manuf. Co.* 135 Mass. 294. *Hanson* v. *Ludlow Manuf. Co.* 162 Mass. 187. *Jarvis* v. *Coes Wrench Co.* 177 Mass. 170. *Halley* v. *Nashua River Paper Co.* 202 Mass. 164. The jury might well find that the plaintiff, unfamiliar with machinery, was not in fault for not realizing this danger, and that the defendant ought to have known of its existence, as it long had been known to the foreman of the room and to McDonald who operated the machine.

Under the second count, for failure to furnish a reasonably safe machine, the same result is reached. This duty also was personal to the employer, and was a continuing obligation which might require "frequent and efficient inspection and repair." *Ryan* v. *Fall River Iron Works Co.* 200 Mass. 188, 192. Aside from the absence of a safety guard, the jury could find that the defendant failed in its duty by allowing the belt to become loose and the machine to be in a defective condition in consequence thereof.

The issue of the plaintiff's due care was clearly for the jury upon her testimony.

It is apparent from what has been said that the defendant's requests were properly refused. The questions of the defective condition of the machine and the hidden peril in its operation, the obviousness of the danger and the plaintiff's assumption of the risk were all for the jury upon the evidence. The second part of the sixth request was not applicable to the case, as the plaintiff's claim was that she was ignorant of the kind or nature of the real danger and not merely of its degree or extent; and that she had neither knowledge of nor reasonable cause to anticipate the danger. *Anderson* v. *Marrinan*, 202 Mass. 193. The last four requests assume the truth of facts that were in dispute.

The exceptions to the charge cannot be sustained. Whether Mrs. Talbot was authorized to direct the plaintiff to obey the

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orders of McDonald was properly and correctly left to the jury. The testimony of the plaintiff and of the defendant's witness McDonald as to the authority and acts of Mrs. Talbot in the defendant's factory made the issue one of fact. The single reference in the charge to a guard was not harmful to the defendant. A guard may have been reasonably necessary to ensure a safe machine. See *Wheeler* v. *Wason Manuf. Co.* 135 Mass. 294. But the judge carefully instructed the jury in this connection that if the risk or danger was obvious, — as the absence of a guard would be, — there was no liability on the part of the defendant for using this machine and it was not bound to provide a different or safer one.

It was discretionary on the part of the presiding judge to read to the jury a request of the plaintiff that had been overlooked; and in doing so he carefully guarded the defendant's rights.

The question asked of the expert witness was admissible. *L'Hote* v. *S. B. Dibble Lumber Co.* 203 Mass. 294. The inquiry as to the practicability of having a guard in front of the knives was relevant under the second count. *Wheeler* v. *Wason Manuf. Co.* 135 Mass. 294. *Silva* v. *Davis*, 191 Mass. 47.

Exceptions overruled.

ARTHUR B. SILSBEE, trustee, *vs.* MARTHA SILSBEE & others.

Suffolk. December 6, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Devise and Legacy. Words, "Issue."

A testator left four sons and two daughters, and gave one sixth of the residue of his estate to or for the benefit of each of his children. When the will was made both of his daughters were married. He provided for their shares of the residue in successive paragraphs. The second of these paragraphs, providing for the share of his daughter M, gave one sixth of the residue to trustees to pay the net income to such daughter during her life, and then provided as follows: "at her decease leaving issue, if said issue shall be under age at the time of her decease, my said trustees shall appropriate so much of said annual income as shall be necessary to their support and education until they shall arrive at the age of twenty one years, and shall divide and pay over the principal of said sixth part to and among said issue, as they respectively arrive at that age, in equal portions to their use and benefit forever." The preceding paragraph, which made a corre-

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sponding provision for the testator's daughter H, was substantially similar in its language except that the distribution after the death of H was directed to be made among her "children," and the word "issue" was used in that paragraph interchangeably with the word "children" in such a way as to make it plain that it was used to mean children. The testator's daughter M, after enjoying the income of her share during her life, died leaving children and also grandchildren who were the children of a deceased child. *Held*, that the testator must be held to have used the word "issue" in the same sense in the corresponding provisions for his two daughters and therefore that the word must be given the meaning of children in the provision relating to the share of his daughter M, so that the distribution on her death should be made among her surviving children excluding the children of her deceased child.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 19, 1911, by the trustee under the will of Michael Shepard, late of Salem, who died on October 10, 1856, for instructions as to the distribution of one sixth part of the residue of the estate of the testator.

The case came on to be heard before *Morton*, J., who at the request and with the consent of all parties interested reserved it upon the bill and answers for determination by the full court.

The whole of that portion of the will which disposed of the residue of the estate of the testator was as follows:

"And as to all the rest residue & remainder of my estate & property, real & personal, of every name and nature, I hereby give devise & bequeath the same as follows viz.

"I give devise & bequeath one undivided sixth part thereof unto my son Thomas Perkins Shepard To have & to hold the same to him his heirs & assigns forever.

"I give devise & bequeath one sixth part thereof unto my son Michael Webb Shepard, To have & to hold the same to him, his heirs & assigns forever.

"I give devise & bequeath one sixth part thereof unto my son Henry Fairfax Shepard, To have & to hold the same to him, his heirs and assigns forever.

"I give devise & bequeath unto Thomas Perkins Shepard, Michael Webb Shepard and John B. Silsbee one sixth part of said residue, To have & to hold the same to their heirs and assigns, upon the following trusts to wit; That my said trustees shall pay over the net annual income thereof to my daughter Harriet C. Bolles wife of Matthew Bolles of Boston, every year during her natural life, and upon her decease leaving issue my said trustees

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shall appropriate so much of said annual income as shall be necessary for the support and education of her children until they shall arrive at the age of twenty one years, & shall divide & pay over the principal of said sixth part to and among said children as they respectively arrive at that age, in equal portions to their use & benefit forever. And if my said daughter shall decease leaving no issue, then my said trustees shall pay over the said one sixth part equally among her heirs according to law. And the seperate receipt of my said daughter shall be a full discharge to my said trustees, said payments being made for her sole and seperate use.

"I give devise & bequeath unto T. P. Shepard, N. Webb Shepard and Jno. B. Silsbee one sixth part thereof, to have and to hold the same to them and their heirs and assigns upon the following trusts, to wit, that my said trustees shall pay over the net annual income thereof to my daughter Martha M. Silsbee wife of John B. Silsbee of said Salem, during her natural life; and at her decease leaving issue, if said issue shall be under age at the time of her decease, my said trustees shall appropriate so much of said annual income as shall be necessary to their support and education until they shall arrive at the age of twenty one years, and shall divide and pay over the principal of said sixth part to and among said issue, as they respectively arrive at that age, in equal portions to their use and benefit forever. And if my said daughter shall decease without issue, then my said trustees shall pay over said income to my said daughters said husband, during his natural life; and upon his decease the principal shall be divided among her heirs according to law. And the seperate receipt of my said daughter shall be a full discharge to my said trustees; said payments being for her sole & seperate use.

"I give devise & bequeath the other sixth part of said residue unto Thos. Perkins Shepard, Michael Webb Shepard, Henry F. Shepard & John B. Silsbee, To have & to hold the same to them & their heirs and assigns upon the following trust, viz. That the said trustees shall apply & appropriate so much of the net income of said one sixth part of said residue as may be necessary for the maintainance and education of my son George Leonard Shepard until he arrives at the age of twenty one years, and shall upon his arriving at that age pay over, the full amount of said one sixth part of said residue, and any accumulation of interest, To have &

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to hold the same to him & his heirs & assigns forever. And if my said son shall decease before arriving at the age of twenty one years, then the whole of the sixth part of said residue, together with any accumulation of interest, as devised & bequeathed for the benefit of such son shall be equally divided among his heirs according to law."

H. W. Palmer, for the plaintiff, stated the case.

R. F. Sturgis, for the surviving children of Martha M. Silsbee.

H. J. Coolidge, for grandchildren of Martha M. Silsbee, children of a deceased daughter.

MORTON, J. This is a bill for instructions as to the construction of the following clause in the will of Michael Shepard, late of Salem: "I give devise & bequeath unto T. P. Shepard, M. Webb Shepard and Jno. B. Silsbee one sixth part thereof [the rest and residue], to have and to hold the same to them and their heirs and assigns upon the following trusts, to wit, that my said trustees shall pay over the net annual income thereof to my daughter Martha M. Silsbee wife of John B. Silsbee of said Salem, during her natural life; and at her decease leaving issue, if said issue shall be under age at the time of her decease, my said trustees shall appropriate so much of said annual income as shall be necessary to their support and education until they shall arrive at the age of twenty one years, and shall divide and pay over the principal of said sixth part to and among said issue, as they respectively arrive at that age, in equal portions to their use and benefit forever. And if my said daughter shall decease without issue, then my said trustees shall pay over said income to my daughters said husband, during his natural life; and upon his decease the principal shall be divided among her heirs according to law."

Martha M. Silsbee died on February 28, 1911, leaving three children surviving her, Arthur B. Silsbee, Martha Silsbee and Thomas Silsbee, and three grandchildren, the children of a deceased daughter, and no other children or grandchildren.

The question is whether the word "issue" is to be construed as meaning children, or whether it should be construed as in *Jackson* v. *Jackson*, 153 Mass. 374, to include all lineal descendants and as taking *per stirpes*. It is said in that case that when personal property is given in trust to pay the income to a person during life and on his death to pay the principal to his issue then living,

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it will be presumed that the intention was that issue should include all lineal descendants, and that they should take *per stirpes* unless a contrary intention appears from other language in the will. We think that there is other language in the will in this case indicating that the word was used as meaning children, and we feel constrained to give it that meaning notwithstanding that the result will be to deprive the grandchildren of the share which their mother would have taken if she had survived Mrs. Silsbee. The testator left six children, four sons and two daughters. He intended substantial equality between them. What was given to the sons out of the residue as well as out of the body of the estate was given to them outright, except that in the case of the youngest son the gift was contingent on his arriving at twenty-one years of age. Certain real estate was given to the two daughters, Mrs. Bolles and Mrs. Silsbee, absolutely; but their shares in the residue were given in trust for their benefit, the same persons being named trustees in both cases. It is plain, we think, that in the clause relating to Mrs. Bolles the words "issue" and "children" are used interchangeably and as synonymous. The testator directs the trustees to pay over the net annual income to his daughter Harriet C. Bolles during her life, "and upon her decease leaving issue my said trustees shall appropriate so much of said annual income as shall be necessary for the support and education of her children until they shall arrive at the age of twenty one years, & shall divide & pay over the principal of said sixth part to and among said children as they respectively arrive at that age. . . . And if my said daughter shall decease leaving no issue, then my said trustees shall pay over the said one sixth part equally among her heirs according to law." It is evident, we think, as we have said, that in the two instances in which it is here used the word "issue" means "children." Having used it in that sense in the clause relating to Mrs. Bolles, there is no reason why the testator should have used it in any other sense in the clause relating to Mrs. Silsbee which immediately follows that relating to Mrs. Bolles. No reason is shown for making any difference between Mrs. Bolles and Mrs. Silsbee in this respect, and the more natural and reasonable construction seems to us to be that which leads to the conclusion that the testator used the word "issue" in the same sense in both clauses. The case is different from *Jackson* v. *Jack-*

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son, 153 Mass. 374, and from *Coates* v. *Burton*, 191 Mass. 180, in that there was nothing to show in those cases that the word "issue" was used in any other sense than as including all lineal descendants. If the clause containing the gift to Mrs. Silsbee had stood alone the case would have been governed by *Jackson* v. *Jackson*, *supra*. The case is also unlike cases of which *Carter* v. *Bentall*, 2 Beav. 551, is an example, where the use of the word "issue" in the disposition of one portion given by the will is accompanied by expressions which show that it is there limited to children, and in the disposition of another portion the word is not only unaccompanied by such expressions but the disposition is itself radically different from that wherein the expressions showing that the word was limited to children occurred. In the present case Mrs. Bolles and Mrs. Silsbee are each given a sixth of the residue, and the general character of the gift is the same in both cases.

It is to be noted that construing the word "issue" as meaning "children," those who take will be the same in the case of both Mrs. Bolles and Mrs. Silsbee, namely, those who survive the life tenant.

We have not deemed it necessary to take up and consider here the numerous cases which have been relied on upon one side and the other. We find nothing in those relied on by the grandchildren inconsistent with the conclusion here arrived at.

Decree to be entered in favor of the three surviving children of Mrs. Silsbee.

PATRICK J. KYLE & another *vs.* MARGARET G. REYNOLDS & others.

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212 - 576
213 - 190
215 - 108

Suffolk. December 6, 7, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Motion of plaintiff to have bill dismissed, Master's report.

After a suit in equity has proceeded to a final hearing before a master, who has submitted to the counsel a draft report containing findings in favor of the defendant, the plaintiff has no right, against the objection of the defendant, to have his bill dismissed on payment of costs.

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MORTON, J. The plaintiffs took numerous exceptions to the master's report; but they have argued only the question of their right, as a right, to have the bill dismissed without prejudice on payment of costs, pursuant to the motion made by them. We therefore treat all the exceptions to the master's report as waived.

The case was sent to a master* on October 4, 1909. Between June 27, 1910, and December 5, 1910, numerous hearings were had. On January 14, 1911, a draft copy of the report was read to counsel after due notice, "and suggestions and alterations were then and there considered." The plaintiffs submitted requests for findings and rulings and for evidence, — forty-eight in all. These were denied except so far as included in the report. On January 23, revised copies of the report were mailed to counsel, and five days were allowed after the receipt thereof for bringing in written objections thereto. The report was filed on January 30. On January 20 the plaintiffs made the motion already referred to that the bill be dismissed without prejudice on payment of the defendants' costs. The judge† who heard the motion made the following ruling: "I understand that the master has heard this case and is about to file his report, I do not think that the plaintiff has the right, as a right to have the bill dismissed without prejudice, and so rule."

We think that the ruling was right. The general rule as stated in *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 171 Mass. 450, and approved in *McQuesten* v. *Commonwealth*, 198 Mass. 172, is that a plaintiff may have his bill dismissed as of right on payment of costs if nothing has been done which has operated materially to change the defendant's position and give him rights which it would operate to his legal prejudice or which it would be inequitable to disregard. If the defendant's position has been so changed and he has acquired such rights, then the court on the defendant's objection and at his request, will refuse to allow the bill to be dismissed and will retain the case for a disposition of it on the merits, or in such other manner as will protect the defendant's rights. See *Chicago & Alton Railroad* v. *Union Rolling Mills*

* John A. Bennett, Esquire.

† *Richardson*, J. The plaintiffs appealed from the order denying the motion and later appealed from the final decree.

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Co. 109 U. S. 702; *Pullman Palace Car Co.* v. *Central Transportation Co.* 171 U. S. 138; *Detroit* v. *Detroit City Railway*, 55 Fed. Rep. 569; *Electric Accumulator Co.* v. *Brush Electric Co.* 44 Fed. Rep. 602; *American Bell Telephone Co.* v. *Western Union Telegraph Co.* 69 Fed. Rep. 666; *Georgia Pine Turpentine Co.* v. *Bilfinger*, 129 Fed. Rep. 131. The mere fact that the defendants may be subjected to future litigation on the same cause of action is not deemed sufficient to prevent the dismissal of the suit as of right.

In the present case we think that there had been such a change in the situation and the defendants had acquired such rights as to render it inequitable to permit the plaintiffs against the objection of the defendants to dismiss the bill on payment of costs. The case had proceeded to a final hearing before the master and a draft copy of his report had been submitted to counsel. The findings of the master were in favor of the defendants. They had the weight and effect of a verdict by a jury and could be set aside only for clear error and mistake on his part. *Trow* v. *Berry*, 113 Mass. 139. *Dean* v. *Emerson*, 102 Mass. 480. Judgment would be entered on them as on the verdict of a jury unless set aside or modified. To permit the plaintiffs now to discontinue as of right on payment of costs would be to interfere with the right which the defendants have acquired to a judgment in their favor on the master's findings, and would give the plaintiffs another opportunity for the trial and determination of questions of fact which already have been fully heard in the manner provided by the course of procedure in equity and decided against them. The plaintiffs rely on *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98. That was a case of an auditor's report in an action at common law. An auditor's report stands very differently from a master's report. It has only the effect of evidence. It is not in any sense an adjudication of the rights of parties and does not *per se* constitute the foundation of a judgment. Before a judgment can be entered there must be a finding or a verdict which may or may not be based on the report. A strong argument no doubt can be made against allowing a plaintiff to discontinue as of right after a case has been sent to an auditor and has been fully and finally heard by him. But the court felt itself constrained in that case to hold that notwithstanding that,

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the plaintiff could discontinue as a matter of right. There is, however, as we have pointed out, a sound distinction between the effect to be given to a master's report and that to be given to an auditor's report, and that renders the case of *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad* inapplicable to the present case.

Decree affirmed with costs.

W. A. Ladd, for the plaintiffs.

C. W. Cushing, for the defendants, submitted a brief.

JAMES H. TOWER *vs.* HERBERT A. MILLER & others.

Bristol. December 11, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Municipal Corporations. Notice. Statute, Construction.

Under St. 1909, c. 514, § 23, a contractor or subcontractor who has furnished material for the construction of a school house under a contract made in behalf of a city by its mayor and its committee on city property, in order to obtain the advantage of the security provided for by the statute, must file a sworn statement of his claim within the required time "with such officers or agents" and a filing of his claim with the city treasurer is not a compliance with the statute.

MORTON, J. The defendant Miller contracted with the city of New Bedford, through the mayor and the committee on city property, for the construction of a schoolhouse. The plaintiff was a subcontractor with Miller. The Charles E. Hall Company was also a subcontractor with Miller. Both subcontractors furnished under their contracts with Miller materials which were used in the construction of the school house. The plaintiff filed with the mayor and committee on city property, within sixty days after the completion of his work, a sworn statement of his claim for the balance due him under his contract with Miller. The defendant Foster as the receiver of the Charles E. Hall Company had previously sent to the city of New Bedford, so addressed, a sworn statement of the balance alleged to be due to it under its contract with Miller,

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which was duly received and filed by the city treasurer of New Bedford.

This is a bill in equity under St. 1909, c. 514, § 23, which is a re-enactment of St. 1904, c. 349, to reach and apply cash security alleged to be held by the city of New Bedford and applicable under said statute to the payment of the plaintiff's claim. The only question is whether the sworn statement, sent by the defendant Foster as receiver of the Charles E. Hall Company to the city of New Bedford and so addressed and received and filed by the city treasurer, conformed to the statute. If it did, then it is agreed that the defendant Foster is entitled to a decree in his favor. If it did not, then the plaintiff is entitled to a decree. The trial judge* found and ruled and made a decree in favor of the plaintiff. The defendant Foster appealed.

We think that the finding and ruling in favor of the plaintiff was right. The statute is as follows: "Officers or agents who contract in behalf of any county, city or town for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and subcontractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security the claimant shall file with such officers or agents a sworn statement of his claim within sixty days after the completion of the work." St. 1909, c. 514, § 23. The matter is wholly one of statutory construction. The statement is to be filed "with such officers or agents." As the statute reads that can have only one meaning, and must mean the officers or agents who contract on behalf of the city or town for the construction or repair of the building. The reason for requiring it to be filed "with such officers or agents" is obvious. They would be familiar with the contract and it naturally would fall to them to look after its performance, and they would take up in the first instance any disputes or claims that might arise or be made in the course of the work or when the time for final settlement came. It is reasonable, therefore, that a statement of the nature provided for in the statute should be filed with them and not with the city or town or its treasurer. And such appears to have been the practice under

* *King*, J.

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similar statutes. See *Burr* v. *Massachusetts School for the Feeble-Minded*, 197 Mass. 357; *Friedman* v. *County of Hampden*, 204 Mass. 494; *Sampson Co.* v. *Commonwealth*, 202 Mass. 326.

Decree affirmed with costs.

Lee M. Friedman, for Albert J. Foster, receiver of the Charles E. Hall Company.

R. A. Terry, for the plaintiff, submitted a brief.

PIERCE L. McCARTHY *vs.* ALBERT L. GORDON.

Suffolk. December 11, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, For an accounting. *Equity Pleading and Practice*, Reference to master.

In a suit in equity for an accounting the trial judge, if he finds that the plaintiff is entitled to an accounting, also can find the amount due to the plaintiff without sending the case to a master.

BILL IN EQUITY, filed in the Superior Court as amended on November 10, 1910, for an accounting.

The case was heard by *Pierce*, J., who, upon a question raised by the defendant during the hearing, ruled "that it was open to him, in case he found that the plaintiff was entitled to an accounting, also on the same trial to determine what amount, if any, the plaintiff was entitled to recover." At the close of the evidence, the defendant asked the judge to make the following ruling: "Upon this hearing the only decree for the plaintiff that can be entered is a decree ordering an accounting or corresponding to the other prayers of the bill, and a decree for the payment of an amount of money as found due from the defendant to the plaintiff is not proper."

The judge refused to make this ruling. He found for the plaintiff in the sum of $932.60; and the defendant alleged exceptions.

C. R. Darling, for the defendant.

J. A. Coulthurst, for the plaintiff, submitted a brief.

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MORTON, J. The only question in this case is whether in case the judge found that the plaintiff was entitled to an accounting, as he did, it was open to him at the same trial to determine the amount, if any, which the plaintiff was entitled to recover. The matter is too plain for discussion. The practice no doubt is to send matters of account to a master, but it was optional with the judge to settle the account himself or send it to a master as he saw fit. The defendant admitted that the taking of the account at that time would not operate as a surprise to him. He is not shown to have been prejudiced in any way by the course that was pursued.

Exceptions overruled.

SIDNEY G. STEEVES *vs.* EDWARD B. BOWEN & another.

Suffolk. December 12, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Decree dismissing bill without prejudice.

Upon a writ containing a bill in equity seeking to restrain the sale or transfer of certain securities which had been placed in the possession of the defendant by the plaintiff and upon which the defendant claimed a lien for a sum due him, an attachment of real estate of the defendant was made, various banks were summoned as trustees and a temporary injunction restraining the defendant as prayed for in the bill was issued. Thereafter the defendant offered to deposit the securities in court and moved that the attachments be dissolved. After negotiations between the parties, an interlocutory decree was entered by consent that, upon the delivery to the defendant by the plaintiff of a bond with a proper surety conditioned upon the plaintiff's paying to the defendant any indebtedness for which it should be determined in the suit that the defendant had a lien upon the securities, the defendant should deliver them to the plaintiff. This decree was performed by both parties. Thereafter, on motion of the plaintiff and against objection by the defendant, a decree was entered dismissing the bill without prejudice and with costs to the defendant, and the defendant appealed. *Held,* that the decree dismissing the bill should be reversed, as the defendant had acquired a right to have the suit proceed to a final determination.

BILL IN EQUITY, inserted in a trustee writ dated October 25, 1910.

The bill alleged that the plaintiff employed the defendants to buy and sell upon margin for his account various securities

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and commodities, intending that there should be no actual purchase or sale thereof, and that the defendants had reasonable cause to believe that the plaintiff so intended; that on account of such employment the plaintiff had delivered to the defendants certain shares of stock in certain corporations which the defendants still had in their possession and control, and which were so secreted and withheld that they could not be replevied, and that the plaintiff knew of no other property of the defendants which could be attached or taken on execution in an action at law. The prayers of the bill were that the defendants be enjoined temporarily from disposing of the shares of stock described, that they be adjudged to be indebted to the plaintiff for the value of such shares, and that they be ordered to deliver such shares or the value thereof to the plaintiff.

After the proceedings described in the opinion, the defendants filed a motion for specifications, and the plaintiff filed a "discontinuance" and a motion "that a final decree be ordered, 'Bill dismissed without prejudice,' with costs to the defendant." The plaintiff's motion was allowed by *Pierce*, J., and a final decree was entered accordingly. The defendants appealed.

Other facts are stated in the opinion.

W. H. Rand, Jr., (*F. H. Stewart* with him,) for the defendants.

F. Foster, for the plaintiff.

MORTON, J. The principle on which this case rests is stated in *Kyle* v. *Reynolds*, *ante*, 110, and need not be restated here. The only question is whether the interlocutory decree and what was done under and pursuant to it constituted such a material change in the position of the defendants and gave them such a right to have the case proceed to a final determination as to render it inequitable to permit the plaintiff to dismiss his bill on payment of costs. We think that it did give them such right and that the dismissal of the bill as of right was wrong. The defendants held the certificates subject to a lien which they claimed to have upon them for what was due to them. The defendants in aid of their motion to have the attachments discharged brought the securities into court and offered to deposit them therein. Thereupon the plaintiff offered to agree to the dissolution of the attachments and injunctions if the securities were turned over to him, and to give a bond with surety conditioned to pay the amount of any indebtedness

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for which it should be determined in said action that the defendants had a lien on the securities. The defendants accepted this offer and a bond satisfactory to them and conditioned also to pay what might be found due the defendants at law or in equity in respect of any transactions between certain specified dates was executed by the plaintiff with surety, and an interlocutory decree was entered by consent that upon the delivery to the defendants of the bond the securities should be delivered to the plaintiff and all injunctions dissolved and all attachments on personal property discharged and those on real estate reduced to $500 and the case referred to a master to hear the parties and find the facts. No master was appointed, but the other things specified in the decree were performed.

What was done must be taken to have been done pursuant to the interlocutory decree thus entered. The fact that the decree was entered by consent and embodied a prearrangement does not in any way alter the effect to be given to it. We think that the effect of the decree and of what was done pursuant to it was to put the defendants in a position where the dismissal of the suit operated materially to their prejudice and did more "than to make the path of the law a little more onerous," as the presiding justice held. Instead of retaining possession of the securities with a lien on them for what if anything was due them, the defendants surrendered them to the plaintiff and received therefor a bond one of the conditions of which was that the plaintiff should pay the defendants the amount, if any, up to $5,000, for which in any final decree it should appear that the defendants had a valid lien on the securities. By the dismissal of the bill the defendants have lost the benefit of this condition and the right to have the amount due them determined in the pending suit as the bond in effect provided. That is a substantial right of which they cannot and should not be deprived against their objection. It also would seem that their position was materially changed to their prejudice when they gave up the securities of which they had possession and on which they claimed a lien and received therefor a right of action on a bond. The result is that the decree dismissing the bill must be reversed.

So ordered.

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DANIEL GILFEATHER *vs.* JACOB COHEN & others.

Suffolk. December 12, 1911. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Mortgage, Assignment.

An owner of land made a contract in writing with a builder for the erection of a building thereon. The contract contained a provision that the owner should execute and deliver to the builder a note for the contract price secured by a mortgage upon the premises, and that the builder should "have full right to assign said mortgage [as] collateral security, or as a direct assignment for the purpose of enabling the builder to obtain the necessary work, labor and materials, by him to be performed and supplied." Upon receiving the mortgage, the builder assigned it as security for a loan of money, and later, after the mortgage note had become due, made a second assignment to another person to secure a note given by him upon which the second assignee advanced money to pay for certain lumber and materials. The second assignee received his assignment in good faith and without knowledge of any breach of contract by the builder. The builder failed to perform his contract. The first assignee of the mortgage foreclosed it by sale for breach of its conditions, and, after satisfying his lien, had in his possession a surplus which both the mortgagor and the second assignee claimed. *Held*, that the second assignee's rights were paramount, not being subject to any equity in favor of the mortgagor arising from the fact that at the time of the second assignment the note was overdue and the builder had broken his contract.

BILL IN EQUITY against Jacob Cohen, William A. Gove and Robert J. Gove, filed in the Superior Court on June 20, 1910, alleging in substance that the defendant Cohen and the plaintiff made a contract in writing for the erection by Cohen for the plaintiff of a building according to certain plans and specifications, that in accordance with the terms of the contract the plaintiff mortgaged the premises to Cohen to secure a note for $5,000, the contract price; that Cohen assigned the mortgage to the defendants Gove to secure loans by them to Cohen; that, for breach of the condition of the mortgage, the defendants Gove had foreclosed the mortgage by a sale and had in their hands the sum of $4,775 as proceeds of the foreclosure sale; and that Cohen had failed to perform the building contract. The prayers of the bill were for an accounting as to the amount due the defendants Gove from the defendant Cohen, that the damages suffered by the plaintiff

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by reason of the defendant Cohen's breach of the building contract be determined, that the defendants Gove be ordered to account for all moneys received from the sale or rental of the premises, and that the defendants Gove be ordered to pay over to the plaintiff, out of the balance in their hands, the amount of damages sustained by the plaintiff by reason of Cohen's breach of contract.

The bill was taken *pro confesso* as to the defendant Cohen.

Emma L. Thurston filed a petition for leave to intervene, which was allowed, averring that the defendant Cohen had made to her a second assignment of the mortgage from the plaintiff to him, and that she was entitled to all the surplus in the hands of the defendants Gove.

The case was heard by *Richardson*, J. The facts are stated in the opinion. A final decree was made that the intervening petitioner Thurston was entitled to the surplus in the hands of the defendants Gove, and that the plaintiff was entitled to execution against the defendant Cohen for $1,050 and costs. The plaintiff appealed.

J. M. Graham, for the plaintiff, submitted a brief.

No counsel appeared for the defendants.

MORTON, J. The contract provided that "the builder shall have full right to assign said mortgage [as] collateral security, or as a direct assignment for the purpose of enabling the builder to obtain the necessary work, labor and materials, by him to be performed and supplied." The agreed facts show that Cohen, the builder, made an assignment of the note and mortgage to the defendants Gove as security for a note for $4,000 given by him to them, on which they advanced him $3,900. Subsequently Cohen made a second assignment of the note and mortgage to the claimant Thurston to secure a note of $1,000 given by him to her, and she advanced on account of said note and security for the payment of lumber and materials which were used to complete the building referred to in the contract, $925, which sum was used to pay for said lumber and materials. When Miss Thurston took the assignment the note and mortgage were overdue. She knew nothing about the terms of the contract between the plaintiff and Cohen. The mortgage was foreclosed by the defendants Gove and there remains in their hands the sum of $586 over and above

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the amount of their note and the expenses of foreclosure. Cohen failed to perform his contract and the plaintiff contends that the note and mortgage are subject in Miss Thurston's hands to any equitable defenses which he might have had in an action by Cohen against him on the note, and that inasmuch as the trial judge has found against Cohen in his favor for breach of contract in the sum of $1,050 he is entitled to the balance in the hands of the defendants Gove.

The lien of the mortgage attached to the balance in the hands of the defendants Gove and passed to the claimant by virtue of the second assignment of the mortgage to her which Cohen had authority to make by the express terms of the building contract. There was nothing in that contract limiting the time within which an assignment could be made, and the claimant took the assignment in good faith for value. As against the claimant it is immaterial, therefore, what defenses the plaintiff might have had in an action by Cohen against him on the note and mortgage. If he wanted to save the right to such defenses he should have reserved it in the building contract; but it is manifest that such a reservation would have destroyed the value of the mortgage for use by Cohen as collateral security, and would have been inconsistent with the right of assignment that was given him to enable him "to obtain the necessary work, labor and materials," and for that reason was no doubt omitted.

Decree affirmed with costs.

RODERICK J. CAMPBELL *vs.* FRANKLIN HAVEN & another.

Suffolk. January 9, 1912. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Contract, Construction.

An agreement made on July 3, 1899, by the grantor in a deed of a lot of land "to pay any assessment which may lawfully be made under" a vote of the board of street commissioners of Boston in 1895 to widen and extend Huntington Avenue in accordance with the provisions of St. 1894, c. 416, "for payment of which any lien now exists on said lot," is not an agreement to pay an assessment for a

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betterment tax made under the provisions of St. 1902, c. 527, after assessments made for the work under St. 1894, c. 416, had been declared invalid; because the word "lien" as used in the agreement referred to a lien existing when the agreement was made, and the lien created by St. 1902, c. 527, did not arise until after the agreement was made.

CONTRACT for breach of an agreement by the defendants, contained in a deed to the plaintiff dated July 3, 1899, of land on Huntington Avenue in Boston, "to pay any assessment which may lawfully be made under the vote of the board of street commissioners passed Jany. 5, 1895, for widening, extending and constructing Huntington Avenue, and for payment of which any lien now exists on said lot." Writ dated January 30, 1906.

The case was referred to Clarence H. Cooper, Esquire, as auditor, and, after the filing of the auditor's report, was tried before *Fox*, J. The only evidence introduced was the deed containing the agreement and the auditor's report, from which it appeared that the vote of the board of street commissioners of January 5, 1895, referred to in the agreement, was a vote under St. 1894, c. 416, for the extension and widening of Huntington Avenue; that, after completion of the work, the superintendent of streets on March 18, 1898, communicated the cost thereof to the city auditor; that the defendants' deed to the plaintiff was delivered on July 3, 1899; that on June 25, 1900, a betterment tax on account of the work was assessed upon the plaintiff and owners of other land adjoining Huntington Avenue; that on March 1, 1902, for errors as to the awarding of contracts for the performance of the work on the way without advertising for bids, all assessments for betterments under St. 1894, c. 416, on account of the work above described were declared to be illegal in *Warren* v. *Street Commissioners*, 181 Mass. 6; 183 Mass. 119; that on June 27, 1902, St. 1902, c. 527, was enacted. That statute in substance authorized the board of street commissioners of Boston, within one year after the day of its passage, to determine the value of the benefit or advantage to each and every parcel of real estate in Boston, beyond the general advantage to all real estate therein, from any public improvement completed by the city within six years before said day, consisting among other acts of the laying out, relocating, altering, or widening of a public way, and to assess on each such parcel a proportional share of such part, not exceeding one half,

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as the board might deem just, of the expenses incurred by the city for such improvement, exclusive of the expenses for sewers and their connections, in excess of $4 per linear foot thereof, and exclusive of all expenses for surface drainage and for water pipes, gas pipes and their connections; provided, that no assessment on any parcel of real estate should exceed the value of said benefit for that parcel.

On January 3, 1902, the board of street commissioners under St. 1902, c. 527, assessed a betterment tax upon the land which was conveyed to the plaintiff by the defendants by the deed in question. The defendants refused to pay the tax. The plaintiff thereupon paid the tax and brought this action.

The judge ordered a verdict for the defendants and at the request of the plaintiff reported the case for determination by this court.

G. F. Ordway, for the plaintiff.

C. Warren, for the defendants.

SHELDON, J. The covenant of the defendants was merely to pay any assessment such as was mentioned in their deed for the payment of which any lien then (July 3, 1899) existed on the lot which they conveyed. An assessment was laid upon the lot in June, 1900, and if this had been a valid assessment it is not denied that the defendants would have been bound to pay it. But it was invalid, and no assessment then could be laid because the work had been illegally done. *Warren* v. *Street Commissioners*, 181 Mass. 6, and 183 Mass. 119. There was then no power to lay any other or further assessment for the work that had been done. *New England Hospital* v. *Street Commissioners*, 188 Mass. 88. *Maloy* v. *Holl*, 190 Mass. 277. There was therefore, when the defendants made their covenant, no power to lay any such assessment upon this lot, and the land was not and could not be subject to any existing lien for the payment of such an assessment.

The assessment now in question was laid under the authority given by St. 1902, c. 527, and was valid because it was so authorized and because that statute was not unconstitutional. *Warren* v. *Street Commissioners*, 187 Mass. 290. But the lien or incumbrance created by that statute could not arise before the statute was passed. The effect of the statute could not have existence before the existence of the statute which was the cause of that effect.

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We cannot doubt that the word "lien" in the defendants' covenant refers to the lien of an existing incumbrance, and is not to be extended to include the possibility of a future incumbrance being created by subsequent legislation which does not appear to have been in the contemplation of the parties. This assessment, because there was at the time of the covenant no power to lay an assessment and no existing lien therefor on the land, does not come within the rule of the cases cited by the plaintiff in which it was held that the lien upon the land of an assessment lawfully made thereon dates from the order of construction, when the liability to assessment existed. Here no assessment was possible until St. 1902, c. 527, took effect; and as we have seen, the lien cannot date back from that time.

Judgment on the verdict.

MUSEUM OF FINE ARTS *vs.* AMERICAN BONDING COMPANY OF BALTIMORE.

SAME *vs.* ILLINOIS SURETY COMPANY.

SAME *vs.* PEOPLE'S SURETY COMPANY OF NEW YORK.

Suffolk. January 10, 1912. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Contract, Construction, Performance and breach, Building contract. *Surety. Payment. Bond*, Construction. *Damages*, In contract.

A building contract provided that payments to the contractor should be made by the owner upon the architect's estimates and certificates and only to the extent of ninety per cent of the amount thereby shown to be due to the contractor. The contractor gave a bond with sureties conditioned upon the performance of the contract. While the work still was unfinished the contractor lacked sufficient funds to pay his employees and at his request the owner lent to him $5,000 and received from him a note secured by an agreement that the owner might apply toward payment of the note any sum that thereafter should become payable to the contractor under the contract. The sum lent to the contractor was in excess of what then was due him, and no architect's certificate was asked for or given before it was made. The contractor used the money so borrowed to pay for labor and materials in carrying out the contract. He later failed to complete the contract and the owner was obliged

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to do so. In an action against the sureties on the bond it was *held*, that the loan to the contractor was an independent transaction and not a payment under the contract in violation of its terms and therefore that it did not relieve the sureties from liability *pro tanto; and also* that the paying of money to the contractor as a loan was not the result of a breach of the contract by the contractor and therefore that the sureties were not liable to the owner on that account.

A building contract provided that the contractor was to act as superintendent of the work without compensation and that, in case of failure and refusal by the contractor to complete performance of the contract, the owner might complete it at the contractor's expense. A bond with sureties was given by the contractor conditioned upon performance of the contract. The contractor having refused to complete the contract, the owner undertook its completion and, it being necessary to employ a superintendent, employed the contractor as superintendent at a stipulated salary. Afterwards it was agreed in writing between the owner, the contractor and the sureties that the contractor should act as superintendent, but the agreement contained no stipulation as to a salary being paid to the contractor. In an action against the sureties on the bond, it was *held*, that under the circumstances the employment of the contractor as superintendent did not discharge the sureties from liability, and that they were liable for sums so paid him by the owner as salary for superintendence.

Under a bond with sureties conditioned upon performance by a contractor of a building contract which, among other things, provided that if the contractor failed or refused to complete the contract the owner might complete it at the contractor's expense, premiums, paid by the owner for insurance against his liability to employees or other persons engaged in completing the building under his management after the contractor has defaulted, are a necessary and proper expense incident to such completion of the work and are properly charged against a surety on the bond.

A surety upon a bond, given by a contractor to the owner of land upon which the contractor had agreed in writing to erect a building for the owner and conditioned upon performance of the contract by the contractor, cannot be held liable, after default by the contractor, for premiums upon the bond which were paid by the owner to the surety company after the default where it appears that the owner and the contractor had agreed that the owner should pay premiums upon the bond, nor for expense incurred by the owner in causing books kept by the contractor to be audited.

THREE ACTIONS OF CONTRACT upon a bond given by one Ambrose B. Stannard and five surety companies, three of whom were, respectively, the defendants, conditioned upon the faithful performance by Stannard of a contract for the construction of the Museum of Fine Arts on Huntington Avenue in Boston. Writs dated March 21, 1910.

The cases were referred to Charles E. Shattuck, Esquire, as auditor. After the filing of the auditor's report they were heard together by *Lawton*, J., without a jury. The material facts are stated in the opinion.

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At the close of the evidence the defendants in the respective actions asked for the following rulings:

"(1) On all the evidence the plaintiff is not entitled to recover on its first count.

"(2) On all the evidence the plaintiff is not entitled to recover on its second count."

"(7) Upon all the evidence it appears that if the defendant might otherwise have been liable upon the bond, such liability has been discharged and released by reason of the dealings between Stannard and the Museum of Fine Arts fully set forth in the auditor's report, said dealings being without the knowledge or consent of the defendant surety.

"(8) The loan to Stannard by the Museum of Fine Arts of the sum of $5,000 in consideration of his note for the same amount, said amount not then being due from the Museum of Fine Arts to the said Stannard nor paid to him under the written certificate of the architect as required by the contract, said payment and arrangement being without the knowledge or consent of the defendant surety company, operated as a discharge of the defendant's liability upon the bond and the plaintiff is not entitled to recover on said bond.

"(9) The agreement to pay and the payment to Stannard, without the knowledge or consent of the defendant surety company, of the sum of $1,000 per month for a period of six months and a half, operated as a discharge of the defendant's liability upon the bond and the plaintiff is not entitled to recover on said bond."

"(11) The $5,000 loaned to Stannard by the Museum of Fine Arts in exchange for which his note was taken, cannot, as against this defendant, be charged to the cost of the work.

"(12) Inasmuch as the plaintiff still retains in its possession uncancelled, the note given by Stannard in consideration of the $5,000 loaned to him, said note must be taken to have been received in payment of the loan and as to the amount thereof, the plaintiff's only claim is against Stannard and it is not entitled to charge the amount of said note to the cost of the building.

"(13) The $6,500 paid by the plaintiff to Stannard for his services in superintending the work after it was taken over by the plaintiff, cannot be charged to the cost of the building in view of the fact that in the agreement of June 2, 1908, Stannard agreed

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to perform such work without stipulating for any compensation, and further, in view of the fact that such agreement for compensation was made without the knowledge or consent of the defendant surety."

"(15) The amount of $2,040.66 paid as premiums for liability insurance, cannot be charged to the cost of the building and the auditor's ruling to the contrary was erroneous."

The rulings were refused. The judge found that the plaintiff was entitled to judgment in each action in accordance with the terms of the bond, and ordered executions as follows: against the defendant in the first action in the sum of $7,066.29, against the defendant in the second action in the sum of $23,554.30, and against the defendant in the third action in the sum of $14,132.58, with interest in each case from December 21, 1909.

With the consent of the parties, the cases were reported for determination by this court under the following agreement: "If the ruling that the plaintiff is entitled to recover is correct, judgment is to be entered in each case for the penal sum of the bond, execution to issue for the respective amounts found due with interest thereon from December 21, 1909, provided that if as matter of law, any of the items objected to by the defendants should, on the evidence and facts reported, have been disallowed, or if the law and the evidence require or warrant the allowance of either of the additional items claimed by the plaintiff, then in either such case, execution is to issue for such smaller or larger amount as the Supreme Judicial Court shall therefore decide that the plaintiff is entitled to on the law and the evidence. If the plaintiff is not entitled to recover, then judgment is to be entered for the defendant in each case."

E. F. McClennen, for the plaintiff.

E. K. Arnold & F. H. Smith, Jr., for the defendants.

SHELDON, J. The defendants contend that their liability has been wholly discharged by reason of the plaintiff's dealing with Stannard. The general principles of law applicable to such a contention are well settled. If the agreement between the plaintiff and Stannard, for the due performance of which by Stannard the defendants severally bound themselves as sureties, was materially changed by the action of the plaintiff and Stannard without the knowledge and consent of the defendants, they would be dis-

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charged from any further liability. *Warren* v. *Lyons*, 152 Mass. 310, 312. *Germania Fire Ins. Co.* v. *Lange*, 193 Mass. 67, 69. If without such change the plaintiff gave up or parted with any security which it had from Stannard, or any means of payment to which under its contract it was entitled for the satisfaction of whatever demand might accrue to it against him by virtue of the contract between them or any right which otherwise would have been available to the defendants as an indemnity or a protection to diminish their loss under their respective contracts of suretyship, then their liability would be diminished to the extent of what was thus parted with. They would not be wholly discharged unless the value of what had been given up equalled the total amount of their liability; but they would be relieved *pro tanto*. *Guild* v. *Butler*, 127 Mass. 386. *St. John's College* v. *Ætna Indemnity Co.* 201 N. Y. 335.

The defendants claim that the transaction by which, before Stannard abandoned his contract, the plaintiff advanced to him the sum of $5,000 was in reality a payment made to him of that sum under the contract, made not only before it was due, but really in violation of the provisions of the contract by which payments were to be made upon the architect's estimates and certificates, and upon them only to the extent of ninety per cent of the amount thereby shown. The plaintiff contends that this was not a payment under the contract at all, that it was an entirely independent transaction.

The only evidence upon this question is what appears by the auditor's report. He has not found that the transaction was anything other than what it appears to be on its face. His report sufficiently shows that the reason of Stannard's desire to borrow the money and of the plaintiff's willingness to lend it to him was his lack of sufficient funds to pay his employees. And simultaneously with the execution of the note Stannard gave to the plaintiff a paper by which, as security for the payment of the note, he agreed that the plaintiff might apply to such payment any sum of money, with an immaterial exception, that should thereafter become payable to him under the contract. The money so borrowed was used by Stannard to pay for labor and materials in carrying out his contract. The money was not due to Stannard; it was not paid upon any estimate or certificate of the architect, nor was any

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certificate for such payment ever issued by the architect. The note never has been cancelled or delivered back to Stannard, and is still held by the plaintiff. The defendants had no knowledge of the transaction.

In our opinion it must be inferred from these facts that the amount of the note was not, and was not intended by either party to be, a payment under the contract. It has none of the earmarks of a payment. None of the requirements of a payment was observed. No receipt appears to have been given for it as a payment. On the contrary a promissory note payable absolutely on demand was given for it. The note was not made payable out of future instalments to become due to Stannard; his agreement went no further than to authorize the application of such instalments "as security" for the note. There is no finding that either party intended or expected that the note should be paid out of such future instalments to come due to Stannard. Much less is there anything to indicate an agreement or understanding that the plaintiff should look only to his future earnings for the payment of the note. It was negotiable in form, and as we have seen was payable absolutely and not upon any contingency or out of any particular fund. If the plaintiff had chosen to do so, it could have put the note in suit the next day after it was taken, and Stannard would not have been allowed to set up in defense any agreement or understanding that it was to be paid only out of the fund designated as security. *Torpey* v. *Tebo*, 184 Mass. 307. *Wooley* v. *Cobb*, 165 Mass. 503, and cases cited. This was a private loan, like the ones discussed in *Bateman Brothers* v. *Mapel*, 145 Cal. 241, and *St. John's College* v. *Ætna Indemnity Co.* 201 N. Y. 335. It was not tied to Stannard's future rights under the contract, as was the case with the note dealt with in *Fidelity & Deposit Co.* v. *Agnew*, 152 Fed. Rep. 955; and the reasoning of that case is not applicable.

As this transaction was not a payment to Stannard at all, we need not consider whether if it had been such it ought to be treated as a material alteration of his contract so as to discharge the defendants entirely, or whether it would merely relieve them *pro tanto*. See *First National Bank* v. *Fidelity & Deposit Co.* 5 L. R. A. (N. S.) 418, and *Glenn County* v. *Jones*, 2 Am. & Eng. Ann. Cas. 764, and the notes to these cases for a collection of the conflicting decisions. Nor need we consider what would be the effect of the

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provision in this contract that "no over certification or [over] payment, if any, shall make void any bond that may be given by the contractor."

But the defendants are not to be held liable for the amount of this note. *St. John's College* v. *Ætna Indemnity Co.* 201 N. Y. 335. The fact that the money was used by Stannard for the purposes of the contract cannot make them so liable. It is for his defaults, not by reason of the proper performance of his obligations, that they are to answer. All the labor and material that he supplied have gone to their benefit, in that he thereby has diminished the amount of the liability to which otherwise they might have been subjected, and his use of the money comes under the same rule. Moreover, the plaintiff still holds the note against Stannard, and we do not know that it will not be paid by him. It was not a part of the cost of the building to the plaintiff, but an investment made by the plaintiff in Stannard's paper. It follows that the amount upon which the respective liability of the defendants was based must be reduced by $5,000.

After Stannard's default upon his contract the plaintiff employed him as superintendent, and on May 29, 1908, agreed to pay and afterwards did pay him therefor a salary of $1,000 a month, amounting to the sum of $6,500. By a supplementary agreement dated June 2, 1908, between the plaintiff, Stannard and the defendants, it was agreed that he should continue to superintend the work, and there was no stipulation for his compensation. The defendants contend that this payment to Stannard operated to discharge them from their obligation, either wholly or at least *pro tanto*. It may be assumed that under the original and supplementary agreements Stannard was bound to act as superintendent without compensation. But he declined to do so, and for the consequences of this default the defendants are chargeable. On the facts found by the auditor, the plaintiff properly employed a superintendent; it had a right to employ Stannard himself; *Newton* v. *Devlin*, 134 Mass. 490; it was not bound by agreement or otherwise to notify the defendants of its action. *Wakefield* v. *American Surety Co.* 209 Mass. 173. The ruling as to this was correct.

As to the amount paid by the plaintiff for premiums upon policies of insurance against its liability to employees or other persons engaged in the work of completing the building, the auditor found

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that this was a necessary and proper expense, and there is nothing to control that finding. It was a necessary expense, resulting directly from Stannard's default, for which the defendants had agreed to be liable. There was no error in the ruling on this question.

The sum of $1,900 paid by the plaintiff to the defendants for renewal premiums rightly was disallowed.* These premiums from the beginning were to be paid by the plaintiff. The sum paid for the audit of Stannard's accounts also was rightly dealt with. This was not an expense caused by his default. So far as it was an expense incidental to the making of the loan to him, it can stand no better than the loan itself.

There is no occasion to consider in detail the requests which were made for rulings. So far as these were refused they are covered by what has been said.

In accordance with the terms of the report, judgment must be entered in each case for the penal sum of the bond sued on, and execution is to issue against the American Bonding Company of Baltimore for $6,549.04; against the Illinois Surety Company for $21,830.16; and against the People's Surety Company of New York for $13,098.09; in each case with interest from December 21, 1909.

So ordered.

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* Premiums upon the bond by agreement between the plaintiff and the contractor were to be paid by the plaintiff. The premiums in question were paid by the plaintiff after the contractor had abandoned the work and the plaintiff had taken it over to complete it and before the work was completed.

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SUSAN HALLORAN vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. January 11, 1912. — February 28, 1912.

212 - 361
215 - 146

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Pleading, Civil, Declaration. *Practice, Civil*, Amendment. *Damages*, In action of tort. *Evidence*, Of special damage, Photograph.

Where in an action for personal injuries the declaration contains no allegation as to special damages and at the trial evidence is admitted tending to show such damages, which is objected to by the defendant but not on any ground relating to the pleadings, the judge after a verdict for the plaintiff has a right to allow an amendment to the declaration setting forth a claim for such damages.

A woman who had been studying music with the intention of becoming a singer for hire received injuries which resulted in an impairment of her voice. At the trial of an action for her injuries she was allowed to introduce evidence of her studies and intentions and of the injury to her voice. *Held*, that the evidence was admitted rightly as bearing on the question of impairment of the plaintiff's earning capacity.

A woman who had been studying music with the intention of becoming a singer for hire and who received personal injuries resulting in an impairment of her voice may be allowed to show as special damages, at the trial of an action to recover for such injuries, that by reason of her injury she was unable to keep an appointment to sing for which she was to have received pay.

At the trial of an action by a passenger against a railroad corporation for personal injuries received in a collision between a car in which the plaintiff was a passenger and an engine of the defendant which ran into the car from the rear, a photograph of the car in question, taken almost immediately after the collision, may be allowed in evidence as tending to show the violence of the collision, although when it was taken the engine had been backed away and some persons were at work upon the car; and the determination of the question, whether the photograph shall go to the jury room, is discretionary with the presiding judge.

TORT for personal injuries received by the plaintiff, while a passenger in the rear car of a train of the defendant, caused by an engine running into the train from the rear. Writ dated April 15, 1909.

The case was tried before *Dubuque*, J.

At the time of the trial the declaration contained only general allegations as to damages. The plaintiff was allowed by the judge to offer the evidence of special damages described in the opinion,

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the defendant objecting, but not on any ground relating to the pleadings.

Other facts are stated in the opinion.

The jury found for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

E. S. Kochersperger, for the defendant.

J. Noble, (*H. J. Coolidge* with him,) for the plaintiff.

SHELDON, J. The judge had a right to allow the plaintiff to amend her declaration, even after verdict. *Whipple* v. *Rich*, 180 Mass. 477, 480. *Commonwealth* v. *National Contracting Co.* 201 Mass. 248. The defendant's objection to the admission of evidence of special damages was not rested upon the pleadings and the merits appear to have been fairly tried without any reference to the insufficiency of the declaration. *Quimby* v. *Jay*, 196 Mass. 584. *Lemay* v. *Springfield Street Railway*, 210 Mass. 63.

The evidence that the plaintiff had been studying music with the intention of becoming a singer for hire, in connection with evidence of injury to her voice, had some bearing upon the question of her earning capacity. It was competent, especially under the amendment. *Ballou* v. *Farnum*, 11 Allen, 73, 77. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 211.

Evidence of the loss of the engagement to sing at the Hotel Somerset was not incompetent under the amendment, if this was due to her injury and resulted in a direct loss of money. It would not be too remote. It does not come within the reason of most of the decisions relied on by the defendant.

There was no exception to the admission of the evidence as to her competition for a scholarship, though it was at first objected to. The defendant's counsel was content with what was said by the judge about this.

It was not wrong to admit the photograph. It tended to indicate the violence of the crash. It was taken very soon, almost immediately, thereafter. Whether it was likely to be practically instructive to the jury was for the judge to say. The facts that the colliding engine had been backed away, and that when the photographer left the place after taking the picture men were at work on the car, were not decisive. We cannot sustain this exception. *Commonwealth* v. *Robertson*, 162 Mass. 90, 97. *Beals* v. *Brookline*, 174 Mass. 1, 18. *De Forge* v. *New York, New Haven, &*

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Hartford Railroad, 178 Mass. 59. *McKarren* v. *Boston & Northern Street Railway*, 194 Mass. 179. *Field* v. *Gowdy*, 199 Mass. 568, 574.

The photograph having been admitted, it was for the judge to say whether it should be taken to the jury room. We cannot revise the exercise of his discretion. *Boston Dairy Co.* v. *Mulliken*, 175 Mass. 447, 448.

Exceptions overruled.

ATTORNEY GENERAL *vs.* CHARLES N. BARNEY, administrator with the will annexed.

Suffolk. January 12, 1912. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Tax, On successions and inheritances.

Under St. 1907, c. 563, § 1, now St. 1909, c. 490, Part IV, § 1, relating to the taxation of legacies and successions, in determining whether a "bequest, devise or distributive share of an estate" exceeds in value the limit of exemption fixed by the statute, the tax commissioner of the Commonwealth has no right to take into account the amount received by the legatee, devisee, or distributee from property situated in another State.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on July 1, 1911, by the Attorney General at the relation of the Treasurer and Receiver General of the Commonwealth, against the ancillary administrator with the will annexed in this Commonwealth of the estate of Frank D. Sweetser, late of Martinez in the State of California, praying that the defendant might be ordered to pay to the Treasurer and Receiver General the sum of $17.36 as a tax due and payable under St. 1907, c. 563, § 1, now St. 1909, c. 490, Part IV, § 1.

The case came on to be heard before *Morton*, J., who, at the request of the parties, reserved it for determination by the full court upon the information, answer and replication and an agreed statement of facts.

The case was submitted on briefs.

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J. M. Swift, Attorney General, *& F. T. Field*, Assistant Attorney General, for the plaintiff.

C. N. Barney & H. T. Lummus, for the defendant.

MORTON, J. The defendant is the administrator with the will annexed of one Frank D. Sweetser, who at the time of his death was domiciled in Martinez in the State of California. The will was duly proved in California. By the will the testator gave to a niece a legacy of $500 and bequeathed the rest and residue to two sisters and a brother in equal shares. The estate amounted to $16,144.20, of which $1,116.07 was in this Commonwealth. This was all that was actually or constructively here, or that came into the hands of the defendant. The legacy of $500 was paid by the executor in California and he distributed the rest and residue, amounting to nearly $5,000 each, between the sisters and the brother. The defendant paid from the estate in his hands the debts due to Massachusetts creditors, the expenses of administration here and the funeral charges incurred here, and at the request of the executor in California divided what remained, which amounted to $631.08, equally between the residuary legatees, each receiving in full $210.36. The Treasurer and Receiver General has assessed a legacy and succession tax upon the estate thus paid over to and distributed by the defendant amongst the residuary legatees and brings this bill to enforce its payment, contending that the amounts severally received by the residuary legatees from the estate in California should be taken into account in determining whether the bequests to them exceeded $1,000 in value, and if they do, as it is plain that they do if that rule is to be applied, that then the estate in the hands of the defendant is liable to a legacy and succession tax. We do not understand the defendant to controvert this if the rule contended for by the Treasurer and Receiver General is the correct rule. The defendant on the other hand contends that the amounts received by the residuary legatees from the California estate should not be taken into account in determining whether the bequests to them exceed $1,000 in value, and if it should not, then he contends, and the Attorney General, as we understand him, concedes, that the tax was unlawfully and improperly assessed.

The testator died in November, 1908. The statute then in force was St. 1907, c. 563, § 1, now St. 1909, c. 490, Part IV, § 1.

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That statute, so far as applicable to the case before us, provides that "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a *bona fide* purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except," etc. Then follow the exceptions which include husband and wife and children and certain other near relatives and connections of the decedent. These are divided into two classes, A and B. The statute then goes on: "And such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the Commonwealth if such value does not exceed," etc. The same language is used in regard to class B, except that the tax is three per cent instead of one per cent. It is manifest that the words "such property" refer to the words with which the section begins, namely: "All property within the jurisdiction of the Commonwealth . . . which shall pass by will" or in the manner there specified. In other words it is on property within the Commonwealth, and on that alone that the tax is imposed. The Attorney General not only does not controvert this but agrees that the statute must be so construed. After providing that administrators and executors shall be liable for the taxes the statute continues: "but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act." It is plain, we think, that the "bequest, devise or distributive share" referred to is of property within the jurisdiction of this Commonwealth. The section deals with property in this Commonwealth and nowhere else. The word "estate" in the connection in which it is used means, and can only mean, property in this Commonwealth. It necessarily follows that in determining whether "a bequest, devise or distributive share" is or is not exempt the tax commissioner has no right to take

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into account the amount received by the devisees or distributees from property situated in another State or country. To do so would be to tax the devisee or distributee indirectly for such property to an amount equal to the amount of the exemption here, and would be contrary to the principle on which the legacy and succession tax is based, which is that it is "an excise tax upon the privilege of passing title to property on the death of its owner." *Kingsbury* v. *Chapin*, 196 Mass. 533, 537. In order to be valid the tax must be levied by the authority that confers the privilege upon property which passes by virtue of the privilege.

It is immaterial what the practice of the administrative officers of the Commonwealth charged with the duty of collecting legacy and succession taxes may have been in regard to considering property within and without the Commonwealth. It is only when a statute is of doubtful import and the practice has been long continued and acquiesced in by all parties interested that it can be resorted to in aid of the construction of the statute. In the present case we discover no such ambiguity in the meaning of the statute as to justify as an aid to construction a resort to the practice of the officers charged with its execution, even if we assume that the practice had been sufficiently long continued to render it otherwise admissible.

There is nothing in the previous history of the statute which tends to show that it should be construed differently from what we have construed it.

Bill dismissed with costs.

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MARY LEMAY *vs.* SPRINGFIELD STREET RAILWAY COMPANY.
TWILLA LEMAY *vs.* SAME.
PHILLINESE RATELLE *vs.* SAME.

5216 - 520

Hampden. January 19, 1912. — February 28, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Appeal.

After the decision of this court in *Lemay* v. *Springfield Street Railway*, reported in 210 Mass. 63, the Superior Court allowed the plaintiffs to amend their declarations by adding in each case a count alleging that the injuries sued for were caused by a defect in a car of the defendant and a failure to inspect it properly. Thereupon by the terms of the conditional rescripts of this court the defendant's exceptions were overruled, and in the Superior Court judgments were entered on the verdicts for the plaintiffs. The defendant appealed from the judgments. *Held*, that, if it were assumed that the question, whether there was any evidence of a defect or of a failure to inspect, was open to the defendant on its appeals, that question was decided against the defendant when the cases were previously before this court.

MORTON, J. These cases were here on the defendant's exceptions and are reported in 210 Mass. 63. It was there held that, as the declaration stood, the twenty-fifth and twenty-sixth requests, which raised a question as to the plaintiffs' right to recover for a defect in the car and for failure on the part of the defendant to inspect it and which are the only ones now relied on by the defendant, should have been given because the count on which the case went to the jury alleged only that the car was carelessly operated and did not allege that it was defective or that the defendant had failed to inspect it. But it was said in the opinion that "the bill of exceptions seems to indicate that the defendant was fully heard upon this question, and it was fairly submitted to the jury. It follows that if the plaintiffs' declarations shall be amended so as to present this issue, justice does not demand a new trial." The rescript directed the following entry to be made: "Exceptions overruled if the plaintiff shall be allowed to amend her declaration within sixty days from the filing of this rescript so as to rely upon a claim that the accident was caused by a defect in the defendant's

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car, and also that it was caused by the defendant's failure to inspect the car. Otherwise, exceptions sustained."

The plaintiffs were allowed to amend their declarations by adding in each case a second count setting out that the accident was caused by a defect in the car and a failure to properly inspect it, and thereupon judgments were entered on the verdicts for the plaintiffs. The defendant appealed. It does not contend that the amendments were not properly allowed.

If we assume in favor of the defendant that the question whether there was any evidence of a defect or of failure to inspect is now open to it, the conclusive answer to its contention that there was not is that the question was decided against it when the cases were here before. The verdicts were general and from the opinion then rendered it plainly appears that the court thought that the question, whether the accident was due to a defect in the car or to lack of proper inspection, though not raised in the pleadings, had been fully and fairly tried and submitted to the jury; and that there was evidence warranting a finding for the plaintiffs on the issue thus raised as well as on that raised by the declaration as it originally stood, and so decided.

It follows that the judgments should be affirmed.

So ordered.

J. B. Ely, for the defendant.

E. W. Beattie, Jr., for the plaintiffs.

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214 - 78

HELENA B. PARKER *vs.* JOHN R. PARKER.

Suffolk. November 13, 1912. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Marriage and Divorce. Superior Court.

Review by RUGG, C. J., of the successive statutes of this Commonwealth authorizing a decree for alimony after the entry of a decree of divorce.

Where a decree for an absolute divorce was made in favor of a wife against a non-resident husband, who received notice of the proceedings only by mail and did not appear and whose property was not attached, the Superior Court under R. L. c. 152, § 30, although it had no jurisdiction to grant alimony when the decree

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for the divorce was made, has jurisdiction to grant a petition of the libellant for alimony which was filed after the libellee had become a resident of this Commonwealth and was served upon him personally.

PETITION for alimony, filed in the Superior Court on January 13, 1911, alleging that the petitioner filed a libel for divorce against the respondent on November 18, 1909, and that on March 18, 1910, a decree of divorce *nisi* was entered in favor of the petitioner which became absolute on September 19, 1910, that when the libel was brought the respondent was not a resident of this Commonwealth, but that he had become a resident of the Commonwealth and that a decree for alimony against him could be enforced.

The respondent appeared specially by counsel for the purpose of contesting the jurisdiction of the court, and also demurred to the petition.

The case was heard by *Pierce*, J. The material facts as agreed by the parties are stated in the opinion. The judge ruled that the court had no jurisdiction to order the payment of alimony for the reason that there was no personal service of the original libel for divorce upon the libellee within this Commonwealth and that after the entry of a decree of absolute divorce the court had no further jurisdiction to decree alimony to the wife. By agreement of the parties the judge reported the case for determination by this court. If his ruling was right, the petition was to be dismissed; otherwise, such proceedings were to be had as justice might require.

E. C. Bumpus, for the petitioner.

C. H. Frost, (*A. L. Doggett* with him,) for the respondent.

RUGG, C. J. This is a petition for alimony brought after the entry of a decree absolute for divorce. Service of the original libel was by publication and mailing, the libellee then being a non-resident of this Commonwealth. He received the notice, but did not appear to contest the libel. His property was not attached. The marriage was solemnized in this Commonwealth. At the time this petition for alimony was filed the libellee had become a resident of this Commonwealth, and he was served personally with the order of notice upon this petition. He contests the jurisdiction of the court. The only question presented is whether, after a divorce absolute upon proceedings against a non-resident who has not appeared in the original suit, the Superior Court has

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authority to decree alimony, provided personal service is made of a petition therefor.

Courts of this Commonwealth cannot grant alimony except and so far as authorized by the statutes. *Davol* v. *Davol*, 13 Mass. 264. *Shannon* v. *Shannon*, 2 Gray, 285. *Page* v. *Page*, 189 Mass. 85, 87. It has been held that relief in the nature of alimony cannot be afforded except as an incident in connection with a divorce. *Adams* v. *Adams*, 100 Mass. 365. The statute, R. L. c. 152, § 30, provides that "Upon a divorce, or upon petition at any time after a divorce, the Superior Court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband." This language in unequivocal terms authorizes the granting of alimony, although none was asked for in the original libel. *Burrows* v. *Purple*, 107 Mass. 428, 432, 433. This language also plainly permits that the alimony may be asked at a time after an affirmative decree upon the original libel. It does not in terms make jurisdiction to grant the alimony dependent upon the jurisdiction existing at the time a divorce was granted. There may be divorce in favor of a resident of this Commonwealth against a non-resident under various circumstances. See R. L. c. 152, §§ 4, 5, 8. It is strongly urged, however, that when the statute is read in the light of its history and its original enactment it confers jurisdiction to grant alimony only in cases in which, at the time of the decree for divorce, the court could have granted alimony. If that contention is sound, the respondent must prevail, for it is plain that the court then had no jurisdiction to grant alimony because there was no personal service upon the libellee and no attachment of his property on the original libel, and he did not appear and was at that time a non-resident. No decree for alimony could be binding against the libellee upon these facts. The court at that time had no jurisdiction of the defendant, and had no authority to enter a judgment for money against him. *Pennoyer* v. *Neff*, 95 U. S. 714. *Haddock* v. *Haddock*, 201 U. S. 562, 567. *Twining* v. *New Jersey*, 211 U. S. 78, 110.

Whether this position of the respondent is tenable depends upon a critical examination of our statutes on the subject. The first statute authorizing a decree for alimony after the entry of a decree for divorce was St. 1853, c. 23. By § 1 of this act, power was conferred "to make at any time, upon petition or proper process there-

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for, any such decree of or respecting alimony . . . as the said court might have made in the original suit." Substantially the same language was retained in Gen. Sts. c. 107, § 48, while the language which was adopted in Pub. Sts. c. 146, § 36, is the same as that in R. L. 152, § 30, quoted above.

In 1853 the authority to grant alimony was somewhat limited. The causes for absolute divorce from the bond of matrimony were adultery, impotency or sentence in the State prison, jail or house of correction for a period of seven years or more (Rev. Sts. c. 76, § 5), utter desertion unconsented to for five consecutive years (St. 1838, c. 126), and uniting with a religious sect, by whose belief the relation of husband and wife was void, and continuing to live with such sect for three years (St. 1850, c. 100) while a divorce from bed and board might be granted for extreme cruelty or utter desertion, and on the libel of the wife, when the husband, being of sufficient ability, grossly, wantonly and cruelly refused or neglected to supply for her suitable maintenance. (Rev. Sts. c. 76, § 6.) There were certain statutes providing for restoration to the wife upon dissolution of marriage, of her separate property to which, under the law in force at that time, the husband had become entitled upon the marriage. (Rev. Sts. c. 76, §§ 27–30.) Unlimited alimony could be granted to the wife, however, only upon a divorce granted upon her libel for the adultery, impotency, uniting with a sect which believed marriage void and sentence to a penal institution, of the husband. Rev. Sts. c. 76, § 31. St. 1844, c. 129. St. 1850, c. 100, § 3. But upon divorce from bed and board for the causes authorized therefor alimony could be granted only in the event that the estate and effects of the wife restored to her under Rev. Sts. c. 76, §§ 27–30, were insufficient for her support. Rev. Sts. c. 76, § 31. By St. 1857, c. 228, utter desertion for five consecutive years and a living separately for five years after a divorce from bed and board were added to the causes in which unrestricted alimony might be granted. In this respect the law remained the same in the Gen. Sts. c. 107, §§ 43, 44. When the General Statutes were enacted, no alimony was permitted in divorces from bed and board for the causes then allowed, namely, for cruelty, desertion, or gross and confirmed habits of intoxication, or gross and wanton neglect on the part of the husband being of sufficient ability to support his wife, unless the

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estate of the wife restored to her under c. 107, § 40, was insufficient for her support. Although in general alimony might be decreed to the wife upon a divorce granted to the husband for her fault (*Graves* v. *Graves*, 108 Mass. 314, *Brigham* v. *Brigham*, 147 Mass. 159), yet there was, in addition to those heretofore enumerated, the important limitation upon this power in Rev. Sts. c. 76, §§ 33, 34 (Gen. Sts. c. 107, § 39), to the effect that in cases of divorce to the husband for the adultery of the wife, the husband should hold her personal property forever and her real estate so long as they both lived, the court being authorized only to decree enough out of such estate, or its income, as might suffice for her subsistence. If she had brought no property to the husband upon or during the marriage, no alimony could be granted to her.

It is obvious from this review of the statutes that the power of the court to grant alimony in the "original suit" was a limited one in 1853 and in 1860. It is apparent that the words of St. 1853, c. 23, § 1, and Gen. Sts. c. 107, § 48, confining alimony ordered upon a subsequent petition to the conditions under which it might have been granted at the time the decree for divorce was entered, had a substantial and practical meaning in the light of these statutory provisions. It was not until the enactment of St. 1873, c. 371, §§ 3, 7, that unrestricted power was conferred upon the court to grant alimony. The language of Gen. Sts. c. 107, § 47, was not then changed, but upon the enactment of the Public Statutes the various sections were brought into consistent and harmonious relation with each other, and naturally there were eliminated the words of limitation, which had been in St. 1853, c. 23, § 1, and Gen. Sts. c. 107, § 48, referring to the original libel for divorce for the definition of the power to grant the alimony upon the subsequent petition. They no longer had any meaning, because there was no longer any limitation upon the power of the court to grant alimony. Thus it appears that the words in St. 1853, c. 23, § 1, and Gen. Sts. c. 107, § 48, permitting the court to make such decree upon a petition for alimony filed subsequent to the divorce, as it "might have made in the original suit," were descriptive of the extent to which, and the conditions under which, alimony could be granted. They conferred the power and defined its scope. They were absolutely necessary in order that the alimony possible under the supplementary petition might not be distinctly larger in character than

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that upon the original libel. They did not refer to the kind of service made upon the libellee and the personal jurisdiction acquired over him thereby. That was left to be determined in accordance with the common rules of practice.

Thus it appears that the history of the statute furnishes no occasion for narrowing its plain import. Its words should be given their natural and unrestrained meaning. This result is in accordance with reason. It is inconceivable that the Legislature consciously used language which would permit a husband, who has resided with his wife in this Commonwealth, to violate his nuptial obligations, to remove beyond the reach of our juridical process and then, after the marriage bond has been severed by our courts at the instance of his wife, to return to the matrimonial domicil freed from all obligation to the woman he has wronged and from possibility of being compelled to make financial reparation to her. Such a conclusion ought not to be reached except under the compulsion of unequivocally precise statutory language.

It follows that the Superior Court had jurisdiction, when a personal service was made upon the libellee on his return to this Commonwealth, to deal with a petition for alimony against him, although at the time of the granting of the original libel it would have had no personal jurisdiction over him.

Demurrer overruled; respondent to have leave to answer.

WILLIAM A. LUNDERKIN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

211 - 518
211 - 520
217 - 134

Suffolk. November 14, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, Street railway.

If an old man, who at the intersection of two streets is proceeding to walk across one of them on which are the tracks of a street railway, is on the lookout for passing cars and, after having been somewhat delayed in waiting for cars to go by, when twelve feet from the tracks sees a car on the nearer track coming toward him slowly one hundred and twenty or more feet away, and, thinking that

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he can pass in front of the car without danger, continues to walk onward and is struck by the car as he is stepping off the farther rail, he cannot be said as matter of law to be wanting in due care.

TORT for personal injuries sustained by the plaintiff from being struck by a street car of the defendant on June 11, 1908, when the plaintiff was walking across Huntington Avenue in Boston at its intersection with Ruggles Street. Writ dated July 18, 1908.

In the Superior Court the case was tried before *DeCourcy*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant, and reported the case for determination by this court. If the ruling of the judge was wrong, a new trial was to be ordered; otherwise, judgment was to be entered on the verdict.

S. C. Brackett, for the plaintiff.

E. P. Saltonstall, for the defendant.

RUGG, C. J. There was evidence tending to show that the plaintiff was walking across Huntington Avenue, where it is intersected by Ruggles Street, when he was struck by a car of the defendant. He stood upon the sidewalk several minutes waiting for cars to pass. Double tracks of the defendant were in a reservation in the middle of Huntington Avenue, on either side of which was a driveway. The distance from the curb of the sidewalk on which the plaintiff stood to the nearest rail of the defendant's track was twenty-eight feet. The plaintiff was seventy-eight years old and was carrying with his arm around its bottom a peach basket filled with clothes. He started to cross Huntington Avenue, and when about midway of the driveway or twelve feet from the nearest rail saw a car moving slowly toward him on the nearer track, and four or five car lengths away. He kept looking at the car occasionally, but thinking he had time to cross continued to walk onward, and just as he was stepping off the farther rail he was struck by the car. The car was about thirty feet in length. The substance of the case is that, although the evidence was conflicting, the jury might have found that an old man, on the lookout for passing cars, after being somewhat delayed in waiting for them to go by, when twelve feet from the tracks, saw a car coming toward him slowly one hundred and twenty or more feet away, and tried to go in front of the car, having made up his mind that

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there would be no danger in passing over the tracks, and was struck when another step would have brought him to a place of safety. This conduct cannot be pronounced wanting in due care, as matter of law. It was a fact proper for the determination of the jury. This case falls within the class of which *Albee* v. *Boston Elevated Railway*, 209 Mass. 6, *Magner* v. *Boston Elevated Railway*, 209 Mass. 60, *Coleman* v. *Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 591, are illustrations. It is distinguishable, either in observation on the part of the plaintiff or the distance of the car or its speed, from *Madden* v. *Boston Elevated Railway*, 194 Mass. 491, *Callaghan* v. *Boston Elevated Railway*, 200 Mass. 450, *Rundgren* v. *Boston & Northern Street Railway*, 201 Mass. 156, and the other cases upon which the defendant relies.

It has not been argued that there was not evidence sufficient to support a finding of negligence on the part of the motorman of the defendant's car. *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232.

New trial ordered.

ADOLPH ROSENBUSH & others *vs.* FERDINAND BERNHEIMER & another, & trustee.

214 - 19
214 - 468
215 - 38
215 - 47

Suffolk. November 16, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Trustee Process. Carrier. Constitutional Law, Obligation of contracts, Due process of law, Interstate commerce.

A carrier may be charged in trustee process as the trustee of the owner of goods, which are in his hands for transportation to such owner as consignee, although when the writ was served the goods were packed in cases and the carrier knew of the contents of the cases only by information, if it appears that the goods were of value and belonged to the defendant.

Where the answer of one summoned as trustee by trustee process discloses property of the defendant in his hands, it cannot be assumed in his favor that his pecuniary interests will be affected adversely by charging him as trustee, if this does not appear from the statements in his answer or from facts agreed or proved outside the answer.

A carrier having in his hands cases of goods lying on a wharf for the purpose of

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immediate transportation to their owner as consignee may be charged in trustee process as trustee of such owner.

The statutes of this Commonwealth providing for the attachment of goods by trustee process cannot be held to violate the Constitution of the United States by affecting the performance of contracts for the carriage of goods entered into when those statutes long had been in force.

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier as the trustee of the owner of goods in his hands for transportation, are in accordance with the requirements of the Fourteenth Amendment of the Constitution of the United States as to due process of law.

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier engaged in interstate commerce as the trustee of the owner of goods in the hands of the carrier for immediate transportation to another State, are not in conflict with the Constitution of the United States, art. 1, § 8, giving Congress power "to regulate commerce with foreign nations, and among the several states."

CONTRACT, by the members of a partnership doing business in Boston, against the members of a partnership doing business in Baltimore in the State of Maryland, for the price of merchandise alleged to have been sold by the plaintiffs to the defendants. The Merchants and Miners Transportation Company, a corporation organized under the laws of the State of Maryland and having a usual place of business in Boston, was named in the writ as trustee and was served as such trustee on August 4, 1910. No service was made on the defendants. The writ was dated August 3, 1910.

The answer of the alleged trustee admitted the receipt on August 3 and 4, 1910, of certain cases said to contain boots, shoes and rubbers at its terminal in Boston for transportation to Baltimore, that all the goods received on August 3 were on its wharf at the time of the service of the plaintiff's writ upon it, and that all of the goods were consigned to the defendants, at Baltimore. The answer concluded as follows: "All of said goods were received by the alleged trustee for immediate transportation from said Boston to said Baltimore. On the respective dates said goods were received by the alleged trustee, it issued through bills of lading covering the transit of the same from Boston to Baltimore. The alleged trustee, therefore, says that such of the goods above mentioned as may have been in its hands or possession at the time of the service of the plaintiffs' writ were in its hands or possession for the purpose of being transported from said Boston to said Baltimore, and were strictly articles of interstate commerce and were held by

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it strictly in its capacity of an interstate carrier, so that the same were not attachable in this proceeding."

In the Superior Court the case came on to be heard by *Richardson*, J., upon a motion of the plaintiffs to charge the alleged trustee. At the hearing on this motion "it was agreed by counsel for the purposes of the motion that title to the goods mentioned in the alleged trustee's answer was in the defendants."

The alleged trustee asked for thirteen rulings, which concluded as follows:

"10. Upon the facts now appearing the alleged trustee must be discharged.

"11. Upon the facts now appearing an order charging the alleged trustee would constitute an impairment of the obligation of the contract of carriage existing between the alleged trustee and the consignees of the goods contrary to the Constitution of the United States, so that the alleged trustee must be discharged.

"12. Upon the facts now appearing an order charging the alleged trustee would deprive it of its property without due process of law contrary to the Constitution of the United States and to the Fourteenth Amendment thereof, so that the alleged trustee must be discharged.

"13. Upon the facts now appearing an order charging the alleged trustee would constitute an interference with interstate commerce contrary to the laws and the Constitution of the United States, so that the alleged trustee must be discharged."

The judge refused to make any of the rulings requested by the alleged trustee, and made the following order:

"It being agreed in open court that the title to the property described in the answer of the Merchants and Miners Transportation Company was in the defendants, it is ordered that the Merchants and Miners Transportation Company be charged upon its answer as trustee of the defendants for all the merchandise, described in its answer, delivered and in its possession before and at time of the service of the plaintiff's writ, subject to the trustee's rights for charges, expenses or liens, if any, it may have upon or on account of said merchandise by reason of any contract or agreement for the transfer of the same according to R. L. c. 189, § 60, or otherwise."

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Being of opinion that this order ought to be determined by this court before any further proceedings in the Superior Court, the judge, at the request of the alleged trustee and with the assent of the plaintiffs, reported the case for such determination.

H. S. Davis, (*A. N. Williams* with him,) for the alleged trustee.

Lee M. Friedman, (*R. I. Dimond* with him,) for the plaintiffs.

RUGG, C. J. This is an action of contract. The defendants are non-residents of this Commonwealth, upon whom no personal service has been made, and who have not appeared. The question is whether the Merchants and Miners Transportation Company shall be charged by reason of an attachment under the trustee process of property in its hands under these circumstances: The Merchants and Miners Transportation Company is a common carrier incorporated under the laws of Maryland, whose steamships ply between Boston and Baltimore. On August 3, 1910, it received from various persons at its Boston terminal for immediate transportation to Baltimore certain cases said to contain shoes consigned to the defendants at Baltimore, and on the same day it issued therefor through bills of lading covering transit from Boston to Baltimore. The plaintiff's trustee writ was served on the transportation company on August 4, while the cases of shoes were upon its wharf in Boston awaiting shipment. It is agreed for the purposes of this case that the title to the goods was in the defendants.

1. The transportation company contends that it is not enough to show at the trial that the goods belonged to the defendants, but that it must appear further that at the time the writ was served the carrier knew or should have known that the goods belonged to the defendants. This ground is not tenable. The defendants were consignees named in the bill of lading, which was some evidence of title. *Forbes* v. *Boston & Lowell Railroad*, 133 Mass. 154. *The Sally Magee*, 3 Wall. 451, 457. *Lawrence* v. *Minturn*, 17 How. 100, 107. Moreover, the fact of ownership in trustee process is the one ultimately to be determined upon the answer of the trustee, or if not discovered therein, by other evidence. R. L. c. 189, § 15. *Phillips* v. *Meagher*, 166 Mass. 152. *Corsiglia* v. *Burnham*, 189 Mass. 347. It is agreed that the defendants were in truth the owners of the goods.

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2. The trustee further contends that, as it does not know of its own knowledge the contents of the cases and had no authority to open them, it cannot be held as trustee under *Bottom* v. *Clarke*, 7 Cush. 487. But that case is plainly distinguishable. It is enough for this purpose that the carrier was informed as to the contents of the boxes, and that they were goods of value.

3. The transportation company has argued ingeniously that it ought not to be charged as trustee, on the ground it had a right to transport the goods for the purpose of earning freight, and to deprive it of this right would be to put it in a worse position pecuniarily by means of the trustee process than it otherwise would be in toward the defendants, citing among other cases *Staniels* v. *Raymond*, 4 Cush. 314, and *Van Camp Hardware & Iron Co.* v. *Plimpton*, 174 Mass. 208, 210. The right of the carrier by water to earn freight has been said to accrue when "the goods are shipped and the voyage is commenced." *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405, 410. Here the voyage had not commenced. In passing it may be observed that this contention was raised in *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway*, 217 U. S. 157, at 164, but was given scant consideration by the court. But it is not necessary to discuss the soundness of this proposition, for the reason that it is not raised by the answer of the transportation company. Its answer discloses possession of property belonging to the defendants, and the only cause set out for not being charged as trustee is that the property was a subject of interstate commerce, and hence not attachable in this process. The answer makes no assertion of right to possession for the purpose of earning freight. Where the answer of the trustee discloses property, he should be charged, unless facts appear which require him to be discharged. It cannot be assumed in his favor without statement in his answer or facts agreed or proved outside the answer that his pecuniary interests will be adversely affected.

4. These being the facts, the case is governed by *Adams* v. *Scott*, 104 Mass. 164, where a common carrier was charged as trustee on his answer that he had in his possession a valuable package for transportation belonging to the defendant. To the same effect are *Cornell* v. *Mahoney*, 190 Mass. 265, *Union Mutual Life Ins. Co.* v. *Holbrook*, 4 Gray, 235, and *Landa* v. *Holck*, 129 Mo. 663. See also *Cox* v. *Central Vermont Railroad*, 187 Mass. 596, 609.

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It is plain from St. 1905, c. 324, which expressly exonerates the common carrier in the absence of fraud or collusion from liability for failure to transport and deliver goods held in its hands by attachment under trustee process, that these decisions thus interpreting the trustee process statutes have been accepted and adopted as a legislative policy. See also St. 1910, c. 214. The case at bar is plainly distinguishable from *Van Camp Hardware & Iron Co.* v. *Plimpton*, 174 Mass. 208, in that the goods had not been loaded on ship, and were not in transit, but were lying on the wharf, and it does not appear that it would cause the transportation company any expense to segregate them. It is not necessary to analyze the numerous cases cited by the transportation company, like *Stevenot* v. *Eastern Railway of Minnesota*, 61 Minn. 104, *Baldwin* v. *Great Northern Railway*, 81 Minn. 247, and *Bates* v. *Chicago, Milwaukee & St. Paul Railway*, 60 Wis. 296, where under different circumstances carriers have been held not liable to garnishment.

5. The goods were "consigned to Bernheimer Bros., Baltimore." Hence the through bills of lading issued by the transportation company were non-negotiable, and the goods were apparently subject to attachment by trustee process under the uniform bills of lading act. See St. 1910, c. 214, §§ 4, 24, 33, 53.

6. It has been argued in behalf of the transportation company that the statute permitting attachment of goods by trustee process is obnoxious to the provision of the Federal Constitution forbidding any State to pass any law which impairs the obligation of a contract. There is nothing in this contention. As was said by Mr. Justice Swayne, in *Edwards* v. *Kearzey*, 96 U. S. 595, at 603, respecting the impairment of contract clause, "The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect." *King* v. *Dedham Bank*, 15 Mass. 447. *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 439. *Kuhn* v. *Fairmount Coal Co.* 215 U. S. 349, 368. Our statute providing for attachment by trustee process was in existence long before the events here in controversy.

7. The same considerations dispose of the transportation com-

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pany's position that the statute as thus interpreted operates to deprive it of its property right secured by the contract without due process of law. The statute was in existence at the time the contract of the transportation company was entered into. If it is otherwise a constitutional exercise of legislative power, it is not rendered invalid by the circumstance that it affects in some degree the common law freedom of action of persons. All contracts are made subject to existing laws, even though such laws might not be operative if intended to be retroactive. This statute comes plainly within the requirements of the Fourteenth Amendment to the Federal Constitution as to due process of law as defined in many decisions of the Supreme Court of the United States. In *Leeper* v. *Texas*, 139 U. S. 462, at 467, 468, Chief Justice Fuller said: "It must be regarded as settled . . . that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." See also *Hagar* v. *Reclamation District*, 111 U. S. 701; *Turpin* v. *Lemon*, 187 U. S. 51, 58.

8. The final ground urged against charging the trustee is that such action would constitute an interference with interstate commerce. It is necessary to determine precisely the nature of trustee process. It is simply one means of attaching property. It has never been decided by any court, as far as we are aware, that property of a debtor was not subject to ordinary attachment at the instance of his creditors merely because it was in process of transportation from one State to another. Immunity from liability to attachment for this cause would afford an easy means for fraudulent debtors to secure exemption of property from payment of debts. The purpose of the statute providing for attachment by trustee process is a laudable one. Its primary design is to enable a creditor to obtain security for his claim. The stability of commercial obligations and the facility of business intercourse between individuals in different States and nations rests in no small measure upon faith in the continuance of established methods of collection of debts. The honor of merchants is supported by the

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efficiency of law. Payment of matured legal promises is a duty enforced alike by considerations of morality and civil law. Remedies to compel the performance of this duty have been provided by the common law for many centuries. Statutes giving greater or less right of attachment of goods, effects and credits in the hands of others than the debtor have been enacted in most, if not all, the States of the Union. Statutes providing some extent of attachment by trustee process have existed in this Commonwealth for more than two hundred years, although a full measure of relief was not given until St. 1794, c. 65. See Prov. St. 1708–9, c. 7. It was exemplified in a custom of the Merchants of London as early as 1481. See Drake on Attachment, §§ 1–8. This method of obtaining a lien for the payment of a debt contemporaneously with the commencement of an action for its collection must have been familiar in some of its phases to most of the members of the convention which framed the Federal Constitution. The constitutionality of such statutes in their operation within the States upon property not in interstate commerce has never been questioned, and cannot be doubted. They are wholly general in scope, and apply equally to all kinds of property within the jurisdiction so made liable to attachment. They do not relate particularly or primarily to interstate commerce. If the application of the law occasionally affects articles of interstate commerce, this is a mere incident of a statute operating widely as to aspects of business intercourse which have always been within the jurisdiction of the several States. It cannot be presumed that the fathers in conferring upon Congress power "to regulate commerce with foreign nations, and among the several states" intended to withdraw from a legal process so universal in its use and generally beneficent in its operation as attachment, either direct or by trustee process, all property, which might be in interstate commerce. It seems plain on principle that attachment laws of the character here in question are not obnoxious to any provision of the Federal Constitution or laws. This is the effect of *Adams* v. *Scott*, 104 Mass. 164, in which the article held subject to trustee process was in transit in interstate commerce, although this point was not there discussed.

The decisions of the Supreme Court of the United States support this view. The laws of the several States "enforcing attachment and execution in cases cognizable in State courts have been

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sustained and upheld. *Johnson* v. *Chicago & Pacific Elevator Co.* 119 U. S. 388–398." *The Winnebago*, 205 U. S. 354, 362. While the enforcement of our trustee attachment statute may now and then temporarily interfere with interstate commerce, such interruption "is incidental only, is almost inseparable from the compulsory enforcement of liabilities of the class in question, is not in conflict with any regulation of Congress, and does not in itself offend against the commerce clause of the Constitution." *Martin* v. *West*, 222 U. S. 191, at 198. The transportation company relies on this point upon cases collected in the footnote.* They are all disposed of, however, contrary to its contention, by *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway*, 217 U. S. 157, a decision which is binding upon all State and federal courts, so far as it is an interpretation of the Constitution or statutes of the United States. In that case cars engaged in interstate commerce were held subject to attachment upon garnishment upon process issuing from a State court in accordance with a State statute, notwithstanding their connection with interstate commerce. The court said at page 177: "It is very certain that when Congress enacted the Interstate Commerce Law it did not intend to abrogate the attachment laws of the States. It is very certain that there is no conscious purpose in the laws of the States to regulate, directly or indirectly, interstate commerce. We may put out of

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* *Wall* v. *Norfolk & Western Railway*, 52 W. Va. 485. *Johnson* v. *Union Pacific Railroad*, 145 Fed. Rep. 249. *Johnson* v. *Union Pacific Railroad*, 29 R. I. 80. *Stevenot* v. *Eastern Railway of Minnesota*, 61 Minn. 104.

Other cases to the same effect are: *Michigan Central Railroad* v. *Chicago & Michigan & Lake Shore Railroad*, 1 Ill. App. 399; *Connery* v. *Quincy, Omaha & Kansas City Railroad*, 92 Minn. 20; *Seibels* v. *Northern Central Railway*, 80 S. C. 133; *Chicago & Northwestern Railway* v. *Forest County*, 95 Wis. 80; *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway*, 146 Fed. Rep. 403. See *Missouri Pacific Railway* v. *Kennett*, 79 Kans. 232.

It may be noted that decisions of the State courts are not unanimous, the conclusion of the opinion being supported by *DeRochemont* v. *New York Central & Hudson River Railroad*, 75 N. H. 158; *Cavanaugh* v. *Chicago, Rock Island & Pacific Railway*, 75 N. H. 243; *Southern Flour & Grain Co.* v. *Northern Pacific Railway*, 127 Ga. 626; *Southern Railway* v. *Brown*, 131 Ga. 245; *Humphreys* v. *Hopkins*, 81 Cal. 551. See *Starkey* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway*, 114 Minn. 27.

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the case, therefore, as an element an attempt of the State to exercise control over interstate commerce in excess of its power. . . . The questions in the case, therefore, depend for their solution upon the interpretation of Federal laws. May the laws of the States for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit and because they give support to commerce, state and interstate), and the Federal laws which permit or enjoin continuity of transportation, [be] so far incompatible that the provisions of the latter must be construed as displacing the former? We do not think so." And on page 179 it was said further, in discussing whether such attachment was inconsistent with the interstate commerce law: "The State may pass laws enforcing the rights of a citizen which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. *Sherlock* v. *Alling*, 93 U. S. 99, 103. *Kidd* v. *Pearson*, 128 U. S. 1, 23. *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477. . . . The interference with interstate commerce by the enforcement of the attachment laws of a State must not be exaggerated. It can only be occasional and temporary." See also *Chicago, Rock Island & Pacific Railway* v. *Arkansas*, 219 U. S. 453, and cases collected in footnote to *Commonwealth* v. *Peoples Express Co.* 201 Mass. 564, at 578.

It follows that the attachment by trustee process of the cases of shoes in the possession of the transportation company was valid, and that the company should be charged.

Order of Superior Court affirmed.

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212 - 108
212 - 387
213 - 188
214 - 321
215 - 471
S 217 - 182

JOHN BURKE *vs.* STEPHEN D. HODGE & another.
JOHN DOMEO *vs.* SAME.
LUIGI PERONE *vs.* SAME.
JOHN BURKE *vs.* DAVID MCARTHUR & another.
LUIGI PERONE *vs.* SAME.
JOHN DOMEO *vs.* SAME.

Middlesex. November 15, 16, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Trial of cases together, Conduct of trial, Exceptions, New trial. *Jury and Jurors. Joint Tortfeasors. Negligence,* Proximate cause.

Where it appears that three actions, each by a workman against his employer, and three other actions by the same plaintiffs against an independent contractor, are for personal injuries alleged to have been caused by the falling of a wall of a building in the construction of which both of the defendants in the cases were engaged, it is a proper exercise of discretion by a judge of the Superior Court to order that the six actions be tried together.

A ruling here was held to have been refused properly, because, although correct as an abstract proposition of law, there was no evidence to which it was applicable.

A remark of a presiding judge in submitting special questions to the jury here was held to have been proper in the connection in which it was used.

Where, after a jury have returned answers to questions submitted to them in writing by the presiding judge, the judge orally asks them a further question with regard to a material issue, he should not accept and act upon an answer given orally by only two of the jurymen, neither of whom is the foreman, although there is no contradiction by the other jurymen.

A workman who was injured by the falling of a concrete wall which his employer was engaged in constructing brought two actions for his personal injuries, one against his employer and the other against a carpenter whose employee, without any order express or implied from the plaintiff's employer, had removed from the wall a wooden form in which the concrete had been placed to harden. The two actions were tried together. At the close of the evidence, the presiding judge did not ask the jury to find a general verdict, but with ample instructions submitted to them seventeen carefully phrased questions in writing, in answer to one of which the jury stated that "the proximate cause" of the accident was the removal of the wooden form. To another question they answered that the plaintiff's employer was negligent in making the concrete for the wall, and to another that the wall fell because the concrete was made of wrong constituents. The judge then asked the jury orally, whether by their answers they meant that the only proximate cause of the accident was the removal of the form by the carpenter or that the negligence of the plaintiff's employer in the mixing

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of the concrete contributed and was also a proximate cause. Two jurors, neither of whom was the foreman, replied orally, "Both." Thereupon the judge ordered verdicts against both defendants. Exceptions of the defendant carpenter were overruled, but, because the judge relied on the answers of the two jurors, exceptions of the plaintiff's employer were sustained, and *it was ordered* that the answers to the seventeen questions submitted to the jury should stand unless the trial judge should determine that justice required a new trial upon the issue in regard to the proximate cause of the accident, and that, in case such a new trial should be ordered, that issue should be modified so as to require an answer showing whether the negligence of the plaintiff's employer in making the concrete was a contributing proximate cause of the accident.

SIX ACTIONS OF TORT, described in the opinion, each to recover for personal injuries suffered by reason of the falling upon the plaintiff of a cellar wall in process of construction in Waltham. The writs in the actions in which John Burke was the plaintiff were dated June 23, 1909. In the other actions against the members of the firm of McArthur Brothers the writs were dated July 9, 1909, and in those against the members of the firm of Hodge, Kerr and Company the writs were dated April 4, 1910.

In the Superior Court the cases were tried together before *Wait*, J. The seventeen questions submitted to the jury and the answers thereto were as follows:

1. "Were Perone, Domeo and Burke each in the exercise of due care? If any were not, who?" Answer, "Yes."

2. "Did either Perone, Domeo or Burke assume the risk of the falling of the wall? If either did, who?" Answer, "No."

3. "Was John Burke a superintendent or one whose sole or principal duty was superintendence?" Answer, "No."

4. "What was the proximate cause of the accident?" Answer, "Removing of the forms."

5. "Were McArthur Bros. negligent in constructing forms or braces?" Answer, "No."

6. "Were McArthur Bros. negligent in removing forms or braces?" Answer, "Yes."

7. "Were Hodge, Kerr & Company negligent in constructing forms or braces?" Answer, "No."

8. "Were Hodge, Kerr & Company negligent in removing forms or braces?" Answer, "Yes, in removing one brace on retaining wall."

9. "Were Hodge or Kerr negligent in making of concrete for the part of the wall which fell?" Answer, "Yes. Kerr."

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10. "Did the wall fall in consequence of removal of supports by McArthur Bros.?" Answer, "Yes."

11. "Did the wall fall in consequence of removal of supports by Hodge, Kerr & Company?" Answer, "No."

12. "Did the wall fall in consequence of improper making of concrete, in the constituents, or mixing?" Answer, "Yes."

13. "Were the plaintiffs Perone or Burke, or either of them, negligent in the mixing of the concrete?" Answer, "No."

14. "Were the plaintiffs or any of them injured in consequence of a negligent failure to warn them, or him, of danger from a falling wall?" Answer, "No."

15. "What are the damages of Burke?" Answer, "$2,700."

16. "What are the damages of Perone?" Answer, "$250."

17. "What are the damages of Domeo?" Answer, "$350."

After questioning the jury orally and receiving the answers of certain of the jurymen, as stated in the opinion, the judge ordered verdicts for Burke in each of the actions in which he was plaintiff for $2,700, for Perone in each of his actions for $250 and for Domeo in each of his actions for $350; and the defendants severally alleged exceptions.

H. D. McLellan, for Hodge, Kerr and Company.

D. W. Corcoran, for McArthur Brothers.

P. J. Duane & J. G. Wright, for the plaintiffs.

RUGG, C. J. 1. These are six actions, each of three different plaintiffs bringing an action against his employers, a firm known as Hodge, Kerr and Company, and another against a firm of independent contractors known as McArthur Brothers, both engaged in the erection of the same building under separate contracts with a third person. The cause of action for each plaintiff was tort for personal injuries received by a falling wall while he was laboring in the construction of the building. In the actions against his employers each plaintiff declared at common law and under the employers' liability act, while in the actions against the independent contractors the counts were at common law. Against the objection and exception of those defendants who were the independent contractors, the judge of the Superior Court directed all the actions to be tried together. In this no error is shown. All the actions grew out of a single physical incident. The evidence by which they were supported and defended was largely the same. The injury received

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by each plaintiff could not vary with the defendant, although the maximum of recovery would differ in the common law action from that under the employers' liability act. Under these circumstances it was proper and within the discretion of the trial judge to order all the cases tried together. *Witherlee* v. *Ocean Ins. Co.* 24 Pick. 67. *Kimball* v. *Thompson*, 4 Cush. 441. *Springfield* v. *Sleeper*, 115 Mass. 587. *Burt* v. *Wigglesworth*, 117 Mass. 302. *Commonwealth* v. *Miller*, 150 Mass. 69. *Sullivan* v. *Boston Electric Light Co.* 181 Mass. 294, 305. *Sullivan* v. *Fugazzi*, 193 Mass. 518, 520. *Jones* v. *Boston*, 197 Mass. 66. R. L. c. 173, §§ 2, 3, have no bearing upon this rule of practice recognized for many years that in the interest of economy of time and expense separate actions depending in great degree upon the same evidence may be tried together in the judicial discretion of the presiding justice.

2. The contract of McArthur Brothers required them to do the carpenter work on the building. It was contended by them at the trial that the evidence showed that they were to build certain forms into which Hodge, Kerr and Company, the plaintiffs' employers, who were contractors for concrete walls, were to place material, and that McArthur Brothers were to remove the forms as ordered by Hodge, Kerr and Company. This evidence is not reported, and from the record it cannot be determined whether it in fact supported these contentions. One Griffin testified that he was a carpenter in the employ of McArthur Brothers, and removed the forms from the part of the wall which fell, the last being about fifteen minutes before the accident, and there was no testimony that this was by direction of Hodge, Kerr and Company or anyone in their employ. Upon this state of the evidence, McArthur Brothers requested the court to instruct the jury that "If Griffin or anybody in the employ of McArthur Brothers removed any forms not in the scope of their employment and without authority of McArthur Brothers, then it is not the act of McArthur Brothers for which they are liable." This was refused, and the jury were instructed that upon the evidence Griffin was one for whose act McArthur Brothers were responsible. The testimony of Griffin being the only testimony upon this point, there was nothing to control his statement that as a carpenter in the employ of McArthur Brothers he performed work which it was a part of their contract to do. There was no evidence on which an inference could be

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founded that he exceeded his instructions or that he was not acting within the scope of his employment. Hence no matter how sound the request may be as an abstract proposition of law, it was refused properly as having no relevancy to the issue raised. The request did not present the point whether Griffin was in the employ of McArthur Brothers, but only whether being in their employ he exceeded his authority. The determination of the question, whether Griffin or others in fact removed the forms, was left to the jury.

3. The defendants, McArthur Brothers, excepted to a portion of the charge. But no error is shown. The jury were not asked to find a general verdict, but to answer seventeen questions, important among which was one as to the proximate cause of the accident. It was in respect to that circumstance that the jury, after being instructed to find what the fact was with regard to the persons who might be responsible for the cause, were told in passing that if the plaintiffs "were not negligent and somebody else was, they are entitled to a verdict, and ordinarily it would not be any matter of interest to them which party they got their verdict against. It would be left to the defendants to fight that battle out between themselves." This was simply one way of impressing upon the minds of the jury their duty to answer the questions according to the evidence, regardless of which firm of defendants might appear to be affected thereby, for that was a matter which would be determined as between the two defendant partnerships in some other way. It cannot be doubted that ample instructions had been given as to the grounds upon which the several questions were to be answered. In view of the careful and definite phrase of each question and the precise point to which each was directed, the language of the charge quoted above, to which exception was taken, is not fairly susceptible of the construction that the jury thereby were given to understand that if the plaintiffs were in the exercise of due care all the defendants were to be held as if they were joint tortfeasors. No one of the questions in terms fixed liability upon either set of defendants, although several related to specific acts of negligence. Liability became a question of law dependent upon the answers given.

4. Among the seventeen questions submitted to the jury were these:

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(4) "What was the proximate cause of the accident?" To which the answer was "Removing of the forms."

(9) "Were Hodge or Kerr negligent in making of concrete for that part of the wall which fell?" To this the jury answered "Yes. Kerr."

(12) "Did the wall fall in consequence of improper making of concrete, in the constituents, or mixing?" To that the answer was "Yes."

For the removal of the forms it appears that McArthur Brothers alone were responsible, while for the concrete Hodge, Kerr and Company were alone responsible. The court gave full and accurate instructions as to what constituted proximate cause, and definitely pointed out that one or more of several causes might be the efficient agency, or that all together might concur, in producing the harmful result. When the answers were returned "the court asked the jurors whether by their answers they meant to find that the only proximate cause of the accident was the removal of the forms by McArthur Brothers or that the negligence of Kerr in mixing of the concrete contributed and was also a proximate cause." Two jurors, neither of whom was the foreman, replied orally without contradiction from their fellows, "Both." Thereupon, without more, the court directed that verdicts be entered for the plaintiff in each of the six cases for the amount of damages found by the jury for each. The exceptions of the defendants constituting Hodge, Kerr and Company bring the legality of this action under review. The foreman of the jury has been recognized by our statutes, and the manner of his choice regulated since the enactment of St. 1807, c. 140, § 11. (Rev. St. c. 95, § 22. Gen. Sts. c. 132, § 25. St. 1881, c. 300. Pub. Sts. c. 170, § 28. St. 1897, c. 515, § 8. R. L. c. 176, § 25.) He is thus recognized by the statutes, as well as by the long established custom of the courts, as the one who presides over the deliberations of the jury. His duty in this regard requires a maintenance of orderly discussion and decision. While his power is no greater than that of any juror, he is by virtue of his office the first juryman, and the chief of the twelve for the purpose of communicating with the court. He is the legally recognized voice of the jury. Through him the jury speaks. His signature alone is appended to verdicts and other papers in which the finding of the jury is expressed, and not

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that of each juror. In most instances the assent of the other members of the panel to all conclusions expressed in open court is asked formally, in order that there may be no mistake. Not infrequently questions are put orally to the jury by the presiding justice. On such occasions it is the general practice to receive the answer of the foreman and of him alone, assented to by his fellows. This is the way in which orderly conduct best can be preserved, except in instances where there is a poll of the jury. In *Spurr* v. *Shelburne*, 131 Mass. 429, it was said: "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him." *Dorr* v. *Fenno*, 12 Pick. 521. Illustrations of the practice of receiving the oral reply of the foreman are found in *Lawler* v. *Earle*, 5 Allen, 22, *Hadley* v. *Heywood*, 121 Mass. 236, *Ellis* v. *Block*, 187 Mass. 408, *Brown* v. *Dean*, 123 Mass. 254, *Edwards* v. *Worcester*, 172 Mass. 104, *Parent* v. *Smith*, 160 Mass. 314, *Chapman* v. *Coffin*, 14 Gray, 454, *Hix* v. *Drury*, 5 Pick. 296, *McManus* v. *Thing*, 208 Mass. 55, and *Hart* v. *Brierley*, 189 Mass. 598, 600, 604.

Even the cases relied upon by the plaintiff are to the same effect. In *Blum* v. *Pate*, 20 Cal. 69, it appears that the foreman spoke for the jury, and the court observed: "the verdict should in all cases be either declared by the foreman of the jury, or, if sealed, read by the clerk." In *Raymond* v. *Bell*, 18 Conn. 81, it is stated in the headnote that the reply was made by the foreman, and in *Roberts* v. *State*, 14 Ga. 18, it is said that the oral response was made by the foreman. Whatever other observations appear were dicta. It was wholly irregular to accept, in reply to a question by the court, a statement as to the view of the jury from any other source than the foreman. When any other than the foreman undertakes to speak, it might well be that the remaining members of the panel would not feel called upon either to approve or dissent. Silence under these circumstances does not imply the sanction that would arise from silence after an answer by the foreman. While this irregularity might have been cured by an express consent by every juryman to the volunteer reply thus interjected, that course was not followed.

Moreover, this oral reply, if it had been regularly made, was

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inconsistent in an essential respect with the written answers returned by the jury, and was not competent to modify their effect. The written answer was clear and unequivocal, to the effect that the proximate cause of the accident was the removal of the forms. This answer was in substance that there was no other proximate cause, in view of the charge and the evidence, upon which it was open for the jury to find that two agencies acting concurrently constituted the proximate cause. It cannot be said, as matter of law, that there was an inconsistency between the answers to questions (4), (9) and (12) which have been quoted. It might have been for aught that appears, that although Hodge, Kerr and Company were negligent in making the concrete and that the wall fell because of improper constituents, the wall would not have fallen as and when it did, and hence the accident would not have occurred, except for the negligence of McArthur Brothers in removing the forms. The concrete wall might have hardened sufficiently, so that it would have stood in such a way as not to have caused the accident but for the negligent removal of the forms. If the Superior Court judge felt that there was any possibility of mistake, he should have sent the jury out again under apt instructions for the correction of any error. *Kenney* v. *Habich*, 137 Mass. 421. *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 594, and cases cited. This was not a case of clerical or palpable error which may be corrected without the jurors leaving their seats. *Whitney* v. *Commonwealth*, 190 Mass. 531, 540, and cases cited. The oral reply of the two jurymen had no effect to modify in any way the formal answers in writing of the jury to the questions submitted to them regularly signed and returned into court. *Cairns* v. *Cairns*, 109 Mass. 408. Upon the written answers of the jury, it follows that the verdicts for the plaintiffs in the three cases against their employers was directed wrongly, and that verdicts should have been ordered for these defendants. Their request to this effect should have been granted. Ordinarily, the circumstances of this case would not call for a direction by this court to enter judgment for the defendants under St. 1909, c. 236. *Archer* v. *Eldredge*, 204 Mass. 323, 327. The plaintiffs have, however, recovered verdicts against McArthur Brothers compensatory in amount for the injuries they have suffered. If they had recovered judgments against the members of both

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firms of defendants they could have had but one satisfaction. They could have recovered judgment against both defendant co-partnerships only on the theory that they were joint tortfeasors. Between joint tortfeasors *in pari delicto* as to each other, there is no right of contribution. *Gray* v. *Boston Gas Light Co.* 114 Mass. 149, 154. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 217. If the reply of the two jurors be considered in this connection, it is apparent that the two defendant firms were joint tortfeasors *in pari delicto*. There is no reason why there should be another trial of the cases, unless the real interests of the plaintiffs require it. The Commonwealth ought not to be put to the expense of another trial merely for the sake of establishing whether two distinct defendants were joint wrongdoers when the culpability of one has been fixed. In any event, the only error in the trial of the actions against Hodge, Kerr and Company relates to the action of the judge of the Superior Court in modifying in effect the written answer of the jury to question (4) as to what was the proximate cause of the injury to the several plaintiffs. All other issues have been fairly settled by the answers of the jury and should not be retried. *Simmons* v. *Fish*, 210 Mass. 563. The exceptions are sustained in the actions against Hodge, Kerr and Company, but the answers are to stand unless the Superior Court shall determine, within sixty days after the rescript, that justice requires a new trial upon issue (4), and if it shall so determine then that issue may be modified so as to read: "Was the negligence of Hodge, Kerr and Company in making concrete for the part of the wall which fell a contributing proximate cause to the accident?" Unless the Superior Court does so determine within sixty days from the rescript, judgment shall be entered for the defendants on the answers.

Let the entry be in each of the actions against the members of the firm of McArthur Brothers

Exceptions overruled.

Let the entry be in each of the actions against the members of the firm of Hodge, Kerr and Company

Exceptions sustained; subsequent procedure in accordance with directions of opinion.

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CHARLES W. DIMICK vs. J. EDWARD BARRY & others.

Middlesex. November 17, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Municipal Corporations, Approval by mayor, "Acting mayor." *Certiorari*. *Way*, Public. *Words*, "Matters not admitting of delay."

The time given to the executive officer of a city for deliberating whether he shall approve or disapprove an act of a legislative body of the city does not begin to run until the legislative act has come to him in fact, and no constructive or implied action falling short of a physical putting of the act before him suffices.

What is a matter "not admitting of delay" as to which under R. L. c. 26, §§ 29, 30, except as otherwise provided by city charters, the presiding officer of the board of aldermen of a city has power to act, in case of the death, resignation or absence of the mayor or of his inability to perform the duties of his office, must be determined according to the usual course of judicial procedure as each case arises.

On June 7 and 8, 1910, the two branches of the city council of a city passed an order laying out a street. The charter required that such an order should be approved or vetoed by the mayor within ten days after it was presented to him. The mayor by reason of illness was absent from his office when the order was passed and continued so until July 6. Under the provisions of R. L. c. 26, §§ 29, 30, the president of the board of aldermen became "acting mayor" possessed of "the powers of mayor only in matters not admitting of delay." The order was presented to and approved by the "acting mayor" on June 10, and never was presented to or approved by the mayor. The city entered upon the location described in the order for purposes of constructing the street on June 1, 1911. Seven days later an owner of land taken in laying out the street petitioned for a writ of certiorari to quash the proceedings. *Held*, that the order was not a matter "not admitting of delay" and that the acting mayor had no power to approve it, that the error in accepting his approval and in not procuring that of the mayor was substantial and not technical, that there was no unconscionable delay by the petitioner, and therefore that the writ should issue.

PETITION, filed on June 8, 1911, for a writ of certiorari, directing the mayor and the members of the board of aldermen and of the common council of Cambridge to quash proceedings with regard to the laying out of an extension of Waverly Street from Erie Street to Pacific Street in that city.

The case was reserved for the full court by *Morton*, J., upon the pleadings and an agreed statement of facts. The facts are stated in the opinion.

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A. Kendall, for the petitioner.

J. F. Aylward, (*F. M. Phelan* with him,) for the respondents.

RUGG, C. J. The point to be decided is the validity of an order passed by each branch of the city council of Cambridge on June 7 and 8, 1910, respectively, laying out a street. The city charter required that it be approved or vetoed by the mayor within ten days after it was presented to him. St. 1891, c. 364, § 11. The mayor was absent from his office continuously from May 6 to July 6, by reason of illness, and was unable to perform his duties. Under R. L. c. 26, §§ 29, 30, the president of the board of aldermen became "acting mayor," and possessed "the powers of mayor only in matters not admitting of delay." The "acting mayor" approved the order on June 10, and it was never presented to nor approved by the mayor.

It has been decided that the time given to the executive officer for deliberating whether he shall approve or disapprove an act of a legislative body does not begin to run until the legislative act has come to him in fact, and that no constructive or implied action, falling short of a physical putting before him, suffices. *Farwell* v. *Boston*, 192 Mass. 15. See *Opinion of the Justices*, 99 Mass. 636, and *Galligan* v. *Leonard*, 204 Mass. 202.

These decisions, together with the express words of the statute and the inherent importance of the acts to be done, indicate the significance attached to the performance of official executive duties by the person elected by the people, rather than by a substitute designated in this instance in another way. The case would be quite different if the statute required the order to be presented to the mayor within a definite time after it was passed by the city council.

The statute makes no provision for the ascertainment of "matters not admitting of delay." Therefore, it must be determined according to the usual course of judicial procedure as each case arises. The powers of the acting mayor are expressly limited to such matters as do not admit of delay. While this language should not be given a narrow or refined interpretation and should be construed in view of the practical necessities of municipal administration, yet it should be given its natural force and meaning in the connection in which it is found. The words are both plain and emphatic. They express a definite conception of a necessity

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so importunate that it cannot be resisted with reason. When a public officer undertakes to perform by way of substitution duties so definitely circumscribed, and their validity is questioned, it must appear that they are warranted and no strong presumptions exist in their favor. The irresistible public urgency which warrants the "acting mayor" in performing the functions of mayor chosen by popular election might be manifested in various ways.

Cases might arise where it would be apparent as matter of law upon the face of the papers that the approval of the order was a matter "not admitting of delay." Such an inference might be drawn respecting a warrant for an election or an appropriation of money to be used for a Fourth of July celebration or a corporate anniversary, or like orders where time appears to be of the essence of the subject. Appropriations necessary for immediate payment of fixed charges of various municipal departments would come within this rule. The nature of the order might stamp it as an emergency measure requiring instant attention. Impending disaster, threatened disorder, public pestilence, devastation by flood or fire illustrate the range of subjects of this character. The lay-out of a public way, although based upon an adjudication that common necessity and convenience require it, usually does not fall within any of these classes. While it is conceivable that an exigency might demand it, there is nothing to indicate that in the case at bar. The city council might vote that any particular order was of a nature not admitting of delay in executive determination as to its wisdom. While this would not be conclusive, in most instances it would be strongly persuasive of the existence of pressing need. Universal acquiescence by public officers charged with the performance of official duties coupled with the acquirement of rights in reliance upon the validity of the act might create a presumption in favor of the existence of the pressing necessity. *Burrage* v. *County of Bristol*, 210 Mass. 299. Instances may arise when the delay of public business required for awaiting the mayor would be so great as to be unreasonable and to create a situation calling for action by the acting mayor. These would be likely to occur in the ordinary conduct of the administrative affairs of the city far more frequently than in the approval of acts of its legislative body.

There is force in the argument that the question whether a

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matter admits of delay or not is an administrative one and must in the nature of things be decided by the officer called upon to act; that it relates to public affairs of importance which ought not to be held in doubt as to their validity until there can be a determination by the courts; that public officers are assumed to act in good faith and that all reasonable presumptions should be drawn in favor of the existence of facts necessary to constitute a legal performance of duty. The adoption of this rule of construction in substance would leave the existence of the exigency requiring action by the acting mayor to his final determination in most instances. The extremely limited power conferred by the statute does not seem to us to indicate a legislative intent to leave a question deemed so important to the conscience of persons clothed temporarily with a power, for the exercise of which they were not primarily selected. The mayor is the one designated by law to be the executive of the city. It is not a mere passing incident which enables another to supplant him, but a pressing urgency of an unusual kind. These two circumstances are emphasized by the statute and lead us to the conclusion stated.

The case at bar comes within none of these principles. There is nothing in the record to indicate that the health of the mayor on June 10 was such that he was not reasonably expected to resume his duties in the near future. In fact, he did return to his public work within four weeks. For aught that appears, the order might well have waited this length of time without detriment to the public welfare. It cannot be said upon this record that it was a matter "not admitting of delay."

This is not an error so technical or insubstantial as not to warrant issuance of the writ of certiorari. Exercise of the power of eminent domain is a governmental function of importance, both to the landowner whose property is taken and the public whose money must pay for it. In this instance the decision of the designated public officer was wanting. There was a failure to comply with an essential provision of the statute which involved the application of sound business judgment and executive discretion upon a matter affecting both public and private interests. It may be that a different result would have been reached if the statute had been followed. *Bowditch* v. *Boston*, 168 Mass. 239, 243. *Warren* v. *Street Commissioners*, 181 Mass. 6.

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The defense of laches has not been relied upon. Upon the facts disclosed in this record it was not apparent, until the city entered upon the land in question and constructed edgestones at a street junction on or about June 1, 1911, that the city might not let the alleged location lapse under R. L. c. 48, § 92. This petition was brought on June 8, 1911. There is nothing to show that any substantial expenditures have been made or that the rights of other persons have been materially affected.

Writ of certiorari to issue.

WILLIAM THOMPSON *vs.* FRANCESCO LUCIANO & another.

Norfolk. November 20, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Mechanic's Lien, Statement, Application of payment on account. *Words*, "Work."

At the trial of a petition to enforce a mechanic's lien for labor performed under an entire contract in writing for labor and materials, it appeared that no sufficient statement of the contract price had been included in the statement filed in the registry of deeds in accordance with R. L. c. 197, § 6. The trial judge refused to give a ruling asked for by the respondent that the statement was insufficient as matter of law to support the petition. The jury answered the issues in favor of the petitioner and the judge without reporting the evidence reported the case to this court for determination. *Held*, that on the record it must be presumed that the findings of the jury were made in accordance with correct instructions and upon evidence adequate to bring the case within the provision of the statute, that such a statement shall not be invalid for failing to state the contract price if it is shown that there was no intention to mislead and that the parties were not in fact misled thereby.

One who was engaged in building chimneys for the owner of a building under an entire contract for labor and materials, received from the owner $500 and gave him a receipt "on account of . . . contract for mason work." Subsequently he filed a petition to enforce a mechanic's lien for a balance due him for labor under the contract, at the trial of which the owner asked for a ruling that the language of the receipt was conclusive evidence that the $500 was to be applied to the labor account. *Held*, that the ruling could not be given, because the word "work" did not necessarily mean "labor."

PETITION, filed December 16, 1907, to enforce a mechanic's lien for labor performed and furnished for the respondents under an

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entire contract in writing for knocking down a stack and building four sixteen-inch chimneys.

The case was tried before *Sherman*, J., upon issues agreed upon by the parties, on each of which the jury found for the petitioner. At the request of the respondents the judge reported the case for determination by this court.

J. E. Crowley, for the respondents.

J. D. Mackay, for the petitioner.

RUGG, C. J. This is a petition to enforce a mechanic's lien for labor performed under an entire written contract for labor and material. There was no sufficient statement of the contract price included in that which was filed in the registry of deeds. *Hurley* v. *Lally*, 151 Mass. 129. *Gogin* v. *Walsh*, 124 Mass. 516. Since these cases were decided, St. 1892, c. 191, now R. L. c. 197, § 6, has been enacted, which provides that "The statement shall not be invalid or insufficient solely by reason of an inaccuracy in stating or failing to state the contract price, . . . if it is shown that there was no intention to mislead and that the parties entitled to notice of the statement were not in fact misled thereby." It is plain, in view of this statute, that the request for a ruling to the effect that the statement was insufficient as matter of law to support a petition to enforce the lien was refused rightly. *Devine* v. *Clark*, 198 Mass. 56. *Brown* v. *Haddock*, 199 Mass. 480, 485. *Borden* v. *Mercer*, 163 Mass. 7. The evidence is not reported, and the findings of the jury in favor of the contentions of the petitioner must be presumed to have been reached in accordance with correct instructions upon evidence adequate to meet these terms of the statute.

The petitioner received from the respondents $500, and gave a receipt therefor "on account of . . . contract for mason work." The request for a ruling that this language of the written "receipt was conclusive evidence that the $500 was to be applied to the labor account" could not have been given properly. Work is used frequently in the sense of an undertaking, enterprise or project, and is not employed necessarily as a synonym for labor. There is nothing in the language of this receipt, which constitutes an appropriation of the payment to the labor account alone. It should be treated as a partial payment on the contract. It did not affect the right of the petitioner to maintain the lien, which he was en-

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titled to enforce, for the value of the labor up to an amount not exceeding, with the payments made, the contract price. *Casey* v. *Weaver*, 141 Mass. 280. *Scannell* v. *Hub Brewing Co.* 178 Mass. 288, 292. R. L. c. 197, § 2.

In accordance with the stipulation filed by the respondents, the lien is to be established for the amount claimed in the account in the statement filed.

So ordered.

MINNIE G. COCHRAN *vs.* CITY OF BOSTON.

Suffolk. November 21, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Damages, In tort, Interest.

A plaintiff in an action against a city under R. L. c. 51, § 18, for personal injuries caused by a defect in a highway is not entitled to have the jury instructed that in ascertaining damages they may add to what they consider to be a fair compensation to the plaintiff for the injuries he has suffered a further sum as interest due to him by reason of the delay caused by his having to resort to an action to enforce his claim.

TORT under R. L. c. 51, § 18, for personal injuries alleged to have been suffered by the plaintiff by reason of a defect in Wenham Street in Boston on May 18, 1909. Writ dated June 29, 1909.

The case was tried in the Superior Court before *Sherman*, J., on April 26 and 27, 1911. The presiding judge refused to instruct the jury that, in ascertaining the damages to which the plaintiff was entitled, they might add to what would be a fair compensation for the injury interest for the time during which the plaintiff was delayed by having to enforce her claim by bringing an action. The jury found for the plaintiff in the sum of $350; and the plaintiff alleged exceptions.

F. G. Bauer, for the plaintiff.

G. A. Flynn, for the defendant.

RUGG, C. J. This is an action for personal injuries received by the plaintiff while a traveller from a defect in a highway. The only question to be decided is whether in such an action the plaintiff is entitled to an instruction to the effect that in ascertaining

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damages the jury have a right to add to the fair compensation interest by reason of delay. The plaintiff relies on *Frazer* v. *Bigelow Carpet Co.* 141 Mass. 126, where it was held that in an action for injury to property the jury, in their discretion, and as incident to determining the amount of the original loss, may consider the delay caused by the defendant. This case has been followed in other cases of tortious injury to property. *Ainsworth* v. *Lakin*, 180 Mass. 397. *Atwood* v. *Boston Forwarding & Transfer Co.* 185 Mass. 557. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 489, 493. The rule in substance adopted in these cases is that, while interest is not allowed as matter of right, the time for which the plaintiff has been kept out of the use of his property or the damage occasioned by the wrong of the defendant may be considered and an amount not exceeding the legal rate of interest may be included therefor in the verdict if necessary in order to give adequate compensation. This principle is applicable to cases where there has been a definite injury to specific property. The reason is that stated by Chief Justice Shaw, in *Parks* v. *Boston*, 15 Pick. 198, in laying down the rule for the computation of interest where property is taken by eminent domain. The injury occurs and is finished in its results on a particular day, and can then best be ascertained, and exact justice would be done by a contemporaneous determination of the loss. An action for personal injuries is essentially different in its nature. The damages are not complete and ended on the day of the accident, but continue for a greater or less period thereafter.

The extent and magnitude of the injury are not infrequently unappreciated and incapable of reasonable ascertainment on the day it is received. Its degree of permanence is often deceptive at the first, and commonly the determination of conditions requisite for recovery is materially assisted by the perspective of time. The most helpful aids in learning the nature and degree of actual injury may be events occurring after the event complained of. There is no fixed standard by which the compensation to be awarded can be measured. Its general rules have been stated many times. The sum of money fixed upon must be such as fairly compensates the injured person for the loss of time, the physical pain and the mental suffering, both that undergone in the past and likely to occur in the future, and also money reasonably expended and to be

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expended in assuaging pain and in restoration to health. Elements that are past and also those which are to come must be considered. Most of them are not capable of mathematical computation. They can be settled only by the sound judgment and conscience of the tribunal by which they are assessed, and they are peculiarly within its province. The damages are to be determined, moreover, as of the day of the trial. It is apparent that interest or considerations akin to interest have no place in an inquiry of this sort. Interest is compensation for the use of money which is due. But the money which the wrongdoer is required by law to pay for the future suffering, expense or loss of time of one whom he has injured is not due until judgment is made up. It is not a debt and does not become a definite obligation until a verdict or finding has been finally entered. It is composed of divers elements, together making up a gross sum, many of which may not have sprung into being on the day when the tort was committed, although directly traceable to it as a cause. If interest were properly chargeable on that which has already accrued, discount should be allowed upon that which relates to the future. Such a method of computing damages would be wholly impracticable. The amount of damages recoverable in actions of this sort, as well as those under certain branches of the employers' liability act and under penal statutes for causing death, is limited to definite amounts. Plainly no interest can be allowed in instances of maximum injury.

It has been the practice in this Commonwealth not to extend the rule of *Frazer* v. *Bigelow Carpet Co.*, *supra*, to cases of this sort. Although the custom has been firmly established and continuous not to allow enhancement of damages by reason of delay, and personal injury actions have been very numerous for many years, the question has never been presented before for consideration. The grounds against such an extension of allowance of interest appear conclusive. This view is supported by the great weight of authority in other jurisdictions. *Railroad* v. *Wallace*, 91 Tenn. 35. *Burrows* v. *Lownsdale*, 133 Fed. Rep. 250. *Jacobson* v. *United States Gypsum Co.* 150 Iowa, 330, 339. *Arkansas & Louisiana Railroad* v. *Stroude*, 82 Ark. 117, 127. *Fell* v. *Union Pacific Railway*, 32 Utah, 101, 111. *Ratteree* v. *Chapman*, 79 Ga. 574, 581. *Sargent* v. *Hampden*, 38 Maine, 581. *Western & Atlantic*

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Railroad v. *Young*, 81 Ga. 397. *Missouri & Kansas Telephone Co.* v. *Vandervort*, 71 Kans. 101. *Pittsburg Southern Railway* v. *Taylor*, 104 Penn. St. 306. *Texas & New Orleans Railroad* v. *Carr*, 91 Texas, 332. *Bommarius* v. *New Orleans Railway & Light Co.* 123 La. 615. See also *Tilghman* v. *Proctor*, 125 U. S. 136, 161; *Shafer Fruit & Cold Storage Co.* v. *Upton Cold Storage Co.* 133 App. Div. (N. Y.) 796.

Exceptions overruled.

OSBORN B. HALL *vs.* BOSTON AND MAINE RAILROAD.

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Middlesex. November 22, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Way, Private. *Adverse Use*. *Railroad*. *Words*, "Occupancy."

The acquisition by an adverse user extending from 1868 to 1908 of a right of way running longitudinally over and along a portion of the land comprised in the location granted to a railroad corporation by county commissioners in 1845 is not prevented by St. 1861, c. 100, which remained in force and is now contained in St. 1906, c. 463, Part II, § 80, and which provided that if a landowner occupied "for the purpose of cultivation or otherwise, any land belonging to or included within the location of any such railroad, no continuance of such . . . occupancy of the land . . . shall create in such adjoining owner . . . any right to the land . . . so . . . occupied."

PETITION, filed on February 26, 1910, for the assessment of damages alleged to have resulted to the plaintiff from the abolition of a grade crossing of Pleasant Street in Malden by the railroad of the defendant.

In the Superior Court the case was tried before *King*, J. It appeared that the defendant had succeeded to the rights of a corporation named the Boston and Maine Extension Railroad, which had been incorporated by St. 1844, c. 172, and which had acquired its location in 1845 by filing a petition and plan of location with the county commissioners as required by the statutes then in force. It also appeared that, unless precluded from doing so by the statutes cited in the opinion, the petitioner had acquired by adverse use from 1868 to 1908 a right of way running longitudinally over

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and along land included in the defendant's location. In the abolition of the grade crossing, such right of way was destroyed and land of the petitioner was taken.

The trial judge ruled that the statutes referred to did not preclude the acquirement of the right of way by adverse use. In answer to special questions the jury found the damages suffered by the petitioner exclusive of the destruction of the right of way to be $4,166.19, and the damages resulting from the destruction of the right of way to be $7,259.50; and the case was reported to this court for determination of the question, whether judgment should issue for $4,166.19, or for $11,425.69.

J. J. Myers, (*A. H. Brooks* with him,) for the petitioner.

G. S. Selfridge, for the respondent.

RUGG, C. J. The petitioner being an owner of land adjoining the railroad location claims a private right of way longitudinally over and along a portion of the location of the respondent acquired by continuous, open and adverse use from 1868 to 1908. The question is whether such an easement can be gained by prescription since the enactment of St. 1861, c. 100, now St. 1906, c. 463, Part II, § 80. The material words of the earlier statute are that if such landowner occupies "for the purpose of cultivation or otherwise, any land belonging to or included within the location of any such railroad, no continuance of such . . . occupancy of the land . . . shall create in such adjoining owner . . . any right to the land . . . so . . . occupied." The language of the earlier act was not changed substantially in St. 1874, c. 372, § 107, and Pub. Sts. c. 112, § 215, in which the St. 1861, c. 100, was successively embodied, and which were in force during the period within which the petitioner's prescriptive period was ripening. This statute was first before the court in *Fisher* v. *New York & New England Railroad*, 135 Mass. 107, which held that its terms did not prevent the acquisition of a private right of way across a railroad location. Upon the authority of this case *Deerfield* v. *Connecticut River Railroad*, 144 Mass. 325, was decided, although according to the plan there referred to and with the original papers in the case it appears that a part of the prescriptive right of way there established ran along the railroad location for about three hundred feet before crossing it. To the same effect are *Turner* v. *Fitchburg Railroad*, 145

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Mass. 433, and *Fitchburg Railroad* v. *Frost*, 147 Mass. 118. In *Maney* v. *Providence & Worcester Railroad*, 161 Mass. 283, it was held that the statute did not prevent prescriptive acquirement of title to land outside of the location owned by a railroad by virtue of a purchase. See also *Littlefield* v. *Boston & Albany Railroad*, 146 Mass. 268. None of these decisions exactly covers the facts of the case at bar, yet in principle they seem to include it. So far as the language of the statute goes, it no more inhibits the gaining of a prescriptive easement of travel longitudinally along, than it does transversely across, the location. But it was said in *Fisher* v. *New York & New England Railroad*, 135 Mass. 107, at 109, "Neither in the letter nor in the spirit of the statute is any intention to be found of cutting off the right to acquire the easement of a right of way across a railroad by twenty years' use." It is also said there that in view of other statutes in effect at its passage, its purpose was "not to allow an abutting owner to gain a title by encroaching on the land adjoining his own." The implication of this language is somewhat toward a title on a parity in kind with that of the abutter. The words, "occupy," "occupied" and "occupancy" have a tendency to indicate a permanence and continuity of possession other and greater than that required in the establishment of a right of way, which might in many instances be infrequent or intermittent. Moreover, the words, "right to the land . . . so . . . occupied" lean slightly toward a kind of interest in the land larger in its nature than a mere easement. Although in other connections the word "occupancy" might be given a somewhat broader meaning, yet in view of the history of these statutes and the trend of judicial interpretation of them, it should be given in this statute a narrower significance. By St. 1892, c. 275, the Legislature for the first time prohibited the acquisition by prescription of a right of way "across any railroad track or location." This lends color to the argument that by the St. 1861, c. 100, and its successors titles in fee and not the lesser interests of an easement were comprehended. It is to be noted that the nature of the title which the respondent claims is that acquired by the filing of a location. It does not assert a title acquired by deed. That which a railroad obtains by filing a location is merely an easement for the uses for which it was incorporated. The fee remains in the former owners.

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Lancy v. *Boston*, 186 Mass. 128, 131. *Cornell-Andrews Smelting Co* v. *Boston & Providence Railroad*, 202 Mass. 585, 596. While the easement is paramount to any right remaining in the former owner, it is not necessarily exclusive. A legislative declaration that the needs of the railroad were paramount to any particular right of the owner of the fee naturally would not be extended beyond its fair import. The early acts of incorporation of railroads indicate a precise perception of the railroad as a highway of travel, which might be open to the general public in something the same way as turnpikes had been used. See, for example, Sts. 1830, c. 4, §§ 5, 6; 1831, c. 72, §§ 5, 6; c. 56, §§ 5, 6; 1833, c. 118, §§ 4, 5; c. 116, § 4. Traces of this early notion as to the functions of railroads may have survived in 1861. It is less likely that the Legislature would prohibit to abutting owners, except by unequivocal language, the use and acquirement of rights for a way, over land devoted to a special kind of public travel, than that it should prevent by reason of the unusual character of the way the gaining of a fee therein, and thereby an extinguishment of the easement.

The conclusion is that there can be established upon the language of the statutes no sound distinction between a right of way across a railroad location and one along it. As the former might have been acquired by prescription during the twenty years subsequent to 1868, the latter could also have been acquired in like manner.

In accordance with the terms of the report, let the entry be

Judgment for the petitioner for $11,425.69 with all costs.

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FRANCIS C. WELCH & others, executors, *vs.* CITY OF BOSTON.
FRANCIS C. WELCH & others, trustees, *vs.* CITY OF BEVERLY.
SAME *vs.* INHABITANTS OF BROOKLINE.
SAME *vs.* INHABITANTS OF MILTON.

Suffolk. Essex. Norfolk. November 22, 23, 1911. — February 29, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Tax, Assessment, Abatement. *Executor and Administrator*. *Statute*, Construction. *Practice, Civil*, Parties.

Where a person who is the executor of a will is also the trustee thereunder, a transfer of personal property held by him as executor to himself as trustee does not become a distribution under St. 1909, c. 490, Part I, § 23, cl. 7, which after notice to the assessors in accordance with the requirements of that clause will render such property no longer assessable to him as executor in the city or town where the testator dwelt, until his account as executor showing the transfer has been allowed by the Probate Court, and on the completion of the distribution by such allowance it does not for the purposes of taxation relate back to the date of the transfer. Reaffirming *Hardy* v. *Yarmouth*, 6 Allen, 277.

One who has filed a list of personal property with the assessors of a town or city is not precluded from maintaining a petition for the abatement of the whole of the tax assessed upon such property.

Upon a petition under St. 1909, c. 490, Part I, § 77, appealing to the Superior Court from the refusal of the assessors of a town or city to abate a tax, the assessors are not proper parties to the proceeding, which is against the town or city.

FOUR PETITIONS, filed in the Superior Court under St. 1909, c. 490, Part I, § 77, the first by the executors of the will of Quincy A. Shaw, late of Boston, and the other three by the same persons as trustees under that will, appealing from the refusals of the assessors of the several respondents to abate taxes on personal property assessed as of April 1, 1910.

The cases came on to be heard before *Jenney*, J., upon the petitions and answers and agreed statements of facts. The judge ruled that the petitioners in the first case were not entitled to any abatement and that in each of the other cases the petitioners were entitled to an abatement. He found for the respondent in the first case and for the petitioners in the other cases, and at the request of the parties reported each of the cases for determination by this court.

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M. Donald, for the petitioners.

T. M. Babson, for the city of Boston.

G. W. Anderson, (*A. E. Lunt* with him,) for the city of Beverly.

W. H. White, for the town of Brookline.

F. Rackemann, for the town of Milton.

RUGG, C. J. These cases involve the validity of assessments made by the assessors of the several defendant municipalities for the year 1910, upon property of the estate of Quincy A. Shaw, a resident of Boston, who died in June, 1908. He left a will, duly allowed in July, 1908, under which the petitioners were appointed executors and also trustees. He gave a devise and legacy to his widow, and the residue to the petitioners in trust for the benefit of his widow and children. The question is whether the estate is taxable under clause 5 or under clause 7 of St. 1909, c. 490, Part I, § 23.*

Narrowly stated, it is whether the estate has been distributed by the petitioners acting in their capacity as executors to themselves as trustees. The material facts upon which it is contended

* The clauses referred to are as follows: "Fifth, Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth it shall be assessed in the place where the executor, administrator or trustee resides; and if there are two or more executors, administrators or trustees residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator or trustee is not an inhabitant of the Commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other State."

"Seventh, Personal property of deceased persons shall be assessed in the city or town in which the deceased last dwelt. Before the appointment of an executor or administrator it shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him. After such appointment it shall be assessed to such executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors stating the name and residence of the several parties interested in the estate who are inhabitants of the Commonwealth and the amount paid to each. After three years from the date of such appointment it shall be assessed according to the provisions of clause Fifth of this section."

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that such a distribution took place are that just before February 1, 1910, the executors met and determined to distribute to themselves as trustees a large part of the estate. Pursuant to this determination, stock certificates and registered bonds were transferred to the petitioners as trustees and certain other transfers of property were made. The physical location of the securities remained as theretofore and in the repositories were other securities belonging to them as executors. A new inventory was opened, in which the securities so transferred were marked as belonging to the trustees and separate accounts were kept except that large overdrafts were made temporarily on the executors' account for the benefit of the trustees. About April 1, 1910, notice in due form was given of the alleged transfers of property by the executors to the assessors of all the defendant municipalities, and lists were filed with them. The trustees contend that thereby they should be assessed under said clause 5 in the several defendant municipalities by reason of residence therein of beneficiaries or of trustees. The city of Boston claims the right to assess the entire estate under said clause 7. No account was filed in the Probate Court showing this distribution by the executors until August, 1910, and it was allowed in November, 1910.

1. The contention is made that reading these two clauses of the statute together the general purpose appears to make property held for beneficiaries taxable in their place of residence, and that under a will like the present establishing a trust fund of many millions of dollars where the debts are comparatively insignificant, such taxes became assessable from and after the death of the testator. Though this argument gains some color from the language of clause 5, it fails to treat the two clauses as correlative parts of a single scheme of taxation, and to give due force to decisive words of clause 7. Clause 7 governs the taxation of estates of deceased persons until the expiration of three years from the date of the appointment of the executor or administrator or until there has been an earlier distribution of the estate together with notice of the required facts to the assessors. *White* v. *Mott*, 182 Mass. 195. Clause 5 governs taxation after the expiration of three years from such date of appointment and within said three years after such distribution and notice. It also governs in case of trusts between the living, or created otherwise than by will.

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This is the only construction which gives natural and adequate meaning to all the language of both clauses of the statute.

2. The inquiry as to what acts one must do in order to transfer property held by him as executor to himself as trustee under the same will has been before this court several times. In *Hall* v. *Cushing*, 9 Pick. 395, at 409, it was said: "before there could be any transmutation of property, . . . the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee." The requirement of an allowance of an account showing a transfer from the accountant in one capacity to himself in the other was laid down again in *Conkey* v. *Dickinson*, 13 Met. 51, 53. In *Hardy* v. *Yarmouth*, 6 Allen, 277, the precise point now argued was presented for decision. Executors of a wealthy testator transferred property to themselves as trustees under the same will, and sought to be taxed accordingly. But it was held that "the estate had not been legally transferred by the executors until their account had been duly filed, allowed and proved in the Probate Court. Until that was done, it was only an initiatory step on the part of the executors to make such account; and the *status* of the property, and the liability of the executors to be assessed therefor in Yarmouth, were not changed."

If that case and the two others cited are still authorities, they control the determination of the case at bar. It has been earnestly urged by the counsel of the petitioners and for the municipalities other than Boston, that they ought to be disregarded. It is said that *Hardy* v. *Yarmouth* was decided correctly, but for another reason. It is true that the same result would have been reached upon the ground that no notice of distribution was given to the assessors. But the case was in fact decided as to the taxes for the year 1859 upon the ground that no account had been allowed in the Probate Court, and upon no other ground.

It is argued further that it has been decided that legacies paid are not proper items for executors' accounts to the Probate Court, and that hence *Hardy* v. *Yarmouth* is wrong in holding that an account showing a transfer allowed by the Probate Court is a prerequisite to a transfer for taxation purposes. Reliance is placed on *Granger* v. *Bassett*, 98 Mass. 462, in support of this

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proposition. In that case the question was as to the effect of a probate account upon the rights as between themselves of residuary legatees in the residuum of the estate. It did not relate to the matter of taxation. One point at issue was whether a division of residuum among several distributees was to be settled by a decree upon an account, and it was held that it was not. The language used on page 469 must be read, as apparently it was intended, as applying to the precise question decided, and not as stating an abstract generalization. It is obvious, both from the tenor of the bonds of the executors then in force (Gen. Sts. c. 93, § 2) as well as from the language and decision of many early and later cases, (see, for example, *Minot* v. *Amory*, 2 Cush. 377, 390; *Miller* v. *Congdon*, 14 Gray, 114; *Hall* v. *Cushing*, 9 Pick. 395; *Eliott* v. *Sparrell*, 114 Mass. 404, 406; *Crocker* v. *Dillon*, 133 Mass. 91, 95, 101; *White* v. *Ditson*, 140 Mass. 351, 355; *Welch* v. *Adams*, 152 Mass. 74; *Shores* v. *Hooper*, 153 Mass. 228; *Brigham* v. *Morgan*, 185 Mass. 27, 45; *Bassett* v. *Granger*, 140 Mass. 183; *Little* v. *Little*, 161 Mass. 188, 202; *Porter* v. *Howe*, 173 Mass. 521; *Cummings* v. *Cummings*, 143 Mass. 340, 344,) that payments of legacies are proper items in the accounts of executors. They have been treated frequently as rightly included in executors' accounts, and questions of importance have been decided arising upon such accounts. There is nothing in *Cowdin* v. *Perry*, 11 Pick. 503, to show that a charge in an executor's account of the payment of a legacy was improper, as a matter of accounting. The point of the decision was that the rights of a legatee were not concluded by such an account. The court said at page 512, "The object of such accounting by the executor, before the judge [of probate], is to show that he has paid according to his charges; and upon producing proof of the fact of payment, such charge is allowed. But whether such payment is rightful, is a question for which the executor himself stands responsible. To hold that an allowance of a payment in account, under such circumstances, would bar a legatee whose legacy is not yet payable, would be pressing the doctrine of *res judicata* beyond all reasonable limits." An executor occupies a dual position, one of direct liability to the legatees, the other of fidelity to the court which appoints him. His liability to the legatee can be satisfied only by payment. For this an action at law is given

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to the legatee. R. L. c. 141, § 19. This remedy is not affected by the allowance of a probate account showing that the legacy has been paid, unless under such circumstances as amount to an estoppel. Fidelity to the court requires the executor conformably to the tenor of his bond to administer according to law and to the will all the estate which comes to his hand, and to render "a true account of his administration at least once a year until his trust is fulfilled." R. L. c. 149, § 1, cl. 3. In order to satisfy fully this obligation, the accounts rendered to the Probate Court should show truly all payments of legacies given by the will, as well as the performance of other duties of settlement of the estate. The provisions of the collateral inheritance tax, St. 1909, c. 490, Part IV, §§ 21, 23, now impose certain special duties upon the Probate Court as to legacies and ascertainment of their amount. These obligations of an executor to legatees and to the court are several, performance of one of which does not necessarily satisfy the other. It is not essential here to determine how an executor might have protected himself in the distribution of such a legacy as was before the court in *Granger* v. *Bassett*, to be divided among several, before St. 1895, c. 134, now R. L. c. 141, § 22. See also R. L. c. 150, § 19. Neither *Granger* v. *Bassett*, 98 Mass. 462, nor *Cowdin* v. *Perry*, 11 Pick. 503, are authority for the proposition that the Probate Court has no right to require evidence in the form of a sworn statement that all the duties of an executor including the payment of legacies have been performed before his final account is allowed, nor that payments of legacies are not proper items in accounts. The many cases cited above distinctly show the contrary. Without shaking the authority of either of those cases in the light of the statutes then existing, they are plainly distinguishable. Upon those points they are of less present value since R. L. c. 141, § 22, and c. 150, § 19. Moreover, whatever doubt may have existed as to the propriety of including distributive payments in an administrator's account was put at rest in its favor by *Palmer* v. *Whitney*, 166 Mass. 306. Apparently it was assumed in *Libby* v. *Todd*, 194 Mass. 507, that legacies stood on the same footing in this respect.

Carleton v. *Ashburnham*, 102 Mass. 348, is relied on as inconsistent with *Hardy* v. *Yarmouth*. But in that case there was no question of transfer from fiduciaries acting in one capacity

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to the same fiduciaries in another capacity. It was the common case of a final distribution of an intestate estate after its complete settlement with full notice to the assessors before the tax was laid. It is put on the practical ground that the statute could not be construed as requiring in every intestate estate a formal account in the Probate Court, although there had been in fact a complete distribution among the heirs at law. It is to be noted also that in that case the tax had been abated. This case lends no color to the proposition that *Hardy* v. *Yarmouth* has been overruled thereby, or to the theory that in the course of the settlement of a large estate involving partial transfers from persons as executors to the same persons as trustees a matter of bookkeeping may suffice.

Finally it is argued that *French* v. *Hall*, 198 Mass. 147, will be overruled by an adherence to the rule of *Hardy* v. *Yarmouth*. But clearly that result will not follow, for in *French* v. *Hall*, at 153, *Conkey* v. *Dickinson*, 13 Met. 51, upon the authority of which *Hardy* v. *Yarmouth* was decided, and *Crocker* v. *Dillon*, 133 Mass. 91, where are reviewed several earlier cases respecting executors' accounts with items of legacies paid, are affirmed and distinguished. *French* v. *Hall* related to two separate and distinct estates, and not to taxation nor to distribution of a single estate. Its decision did not affect the principle of *Hardy* v. *Yarmouth*, nor will it be overruled by adherence to that principle. *Cotton* v. *Boston*, 161 Mass. 8, is not inconsistent with *Hardy* v. *Yarmouth* in any respect. It simply decided that when an executor actually continued to carry on the shop of his testator as he had done during his life, the stock of goods was taxable under clause 1, and not under clause 7 of Pub. Sts. c. 11, § 20, now St. 1909, c. 490, Part I, § 23.

There is much to be said in favor of the rule established by *Hardy* v. *Yarmouth*, if the question was new. It is simple, and easily understood. Neither the ordinary assessor, tax gatherer or taxpayer can be in doubt as to what it means nor as to the result of its application. It is based on publicity respecting subjects of taxation. This of itself is no insignificant advantage in a Commonwealth whose fundamental law requires equality of taxation. It is easy of comprehension, both by executors and assessors. Compliance with it is not difficult. Executors do not

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need to couple with their account of transfer of property coming within its operation other items involving controversy and delay. Experience of these many years during which it has been regarded as law does not appear to have revealed the obstacles to its just enforcement which have been suggested in argument.

But whatever may be said respecting its inherent merits, it has been established. It ought not to be lightly disturbed. Stability of interpretation is signally desirable in matters relating to taxation. A shifting policy in this regard would be fraught with unusual misfortune. The reasons in favor of the doctrine of *stare decisis* are especially forceful in a case like this. *Mabardy* v. *McHugh*, 202 Mass. 148. *Hardy* v. *Yarmouth* was a tax case decided upon a statute in all material respects like the present one. It has been treated as the law of the Commonwealth for nearly half a century. The Legislature has revised the laws relating to taxation several times, but always has left unchanged its provisions as thus interpreted. It cannot be doubted that large sums of money have been paid in taxes and valuable rights affected under its terms. It concerns a subject of vital importance to the administration of public affairs. No valid reason appears to us to demand its change.

The conclusion is that *Hardy* v. *Yarmouth* has not been overruled. Continued adherence to the rule it established will not overrule any of our cases. No sound argument has been advanced which warrants its being overruled. Being applicable to the present cases, it is reaffirmed. It has established by judicial interpretation the meaning of the words of said clause 7 of our tax law requiring continued assessment of the estate of a deceased person to the executor in the city or town where the testator dwelt "until it has been distributed." The meaning is that where a part or the whole of the estate given to the same person or persons as trustees, who are also executors, there must not only be some definite, unequivocal and final act of transfer from the executor to the trustee, but such act before it can become "authoritative and notorious" (*Newcomb* v. *Williams*, 9 Met. 525, 535) must be shown by an account duly filed and allowed by the Probate Court.

3. It follows that the acts performed by the executors in the transfer of property to themselves as trustees fall short of accom-

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plishing a distribution for the purposes of taxation within the meaning of St. 1909, c. 490, § 23, cl. 7.

4. It is urged, however, that the account of the executors filed in August, 1910, and allowed by the Probate Court the following November, which showed this distribution as made in February, 1910, related back to the latter date, and rendered the distribution efficacious for the purposes of taxation in April, 1910. Although in some respects as applying to other circumstances this argument would be sound, it is answered as to this case by what has been said. The "authoritative and notorious act," which is necessary to effect a distribution, is not completed until the account is allowed by the Probate Court. As this did not occur until after April, 1910, there had been no distribution at the time it was necessary to levy the tax.

5. The petitioners are not precluded by giving notices and filing lists from maintaining their several petitions. A petition for an abatement is the proper form of remedy, even though the entire tax may have been assessed illegally. *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491.

6. In some of the cases at bar the assessors of the respondent municipalities have appeared and answered. They are not proper parties in cases like the present. The aggrieved taxpayer first applies to the assessors as a quasi judicial tribunal for an abatement of his taxes. On appeal his complaint runs against the city or town. See *Cheney* v. *Dover*, 205 Mass. 501, 503; *Welch* v. *Boston*, 208 Mass. 326.

In accordance with the terms of the several reports, let the entries be:

In the petition against the city of Boston: Judgment is to be entered for the city of Boston for its expenses and costs.

In the petition against the city of Beverly: The petitioners are entitled to an abatement and judgment is to be rendered for them for $73,174.50 together with interest and costs.

In the petition against the town of Brookline: The petitioners are entitled to an abatement and judgment is to be rendered for them for $30,697.70 together with interest and costs.

In the petition against the town of Milton: The petitioners are entitled to an abatement and judgment is to be rendered for them for $10,236.75, together with interest and costs.

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BAR ASSOCIATION OF THE CITY OF BOSTON *vs.* PETER J. CASEY.

Suffolk. December 4, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Attorney at Law. Disbarment Proceedings.

A proceeding for disbarment is an exercise by the court of its jurisdiction to deal with the alleged misconduct of an officer of the court, and an incorporated bar association which is the petitioner in such a proceeding is not a party to a suit but merely calls the attention of the court to the alleged misconduct of the attorney, so that honorary membership in the petitioning association does not disqualify a judge from sitting in the case.

HAMMOND, J. This was a petition filed in the Superior Court by the Bar Association of the City of Boston for the disbarment of the respondent for alleged misconduct therein set forth. In response to an order of notice the respondent appeared and filed an answer. There was a hearing on the merits, and on April 9, 1906, an order of disbarment was entered. The respondent appealed, and at his request the case was reported to this court for the determination of the question whether under the findings of fact made by the judge "the order of disbarment was justified as a matter of law." After full argument in this court the order of disbarment was affirmed. 196 Mass. 100. Thereupon the respondent filed in the Superior Court a motion to vacate the order of disbarment and in arrest of judgment, and afterwards a motion for a new trial and several other motions which were heard and determined adversely to the respondent; and upon appeals, seven in number, the respondent again brought the case to this court where, after due hearing, the orders appealed from were all affirmed and it was ordered that judgment be entered in the Superior Court in accordance with the order of disbarment of April 9, 1906. 204 Mass. 331. After the issue of the rescript and before final judgment in the Superior Court, the respondent filed there a motion to set aside all orders, decisions and findings theretofore made in that court, and also a motion in arrest of judgment.

At the hearing on these motions it appeared that Mr. Justice

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Fessenden, who issued the original order to show cause; Mr. Justice Fox, who heard the cause on the merits, made the finding thereon and the order of disbarment of April 9, 1906; and Mr. Justice Pierce, who made a certain order as to the disbarment, were respectively, at the times in which they thus acted, honorary members of the Bar Association of the City of Boston, in whose name the petition was filed. The respondent in substance asked the court to rule that these several judges being such members were thereby disqualified to sit in the case. The court refused so to rule and ruled that upon all the evidence neither of these judges "was disqualified to act and find as . . . [he] . . . did find, by reason of interest or otherwise." The respondent also asked for a ruling "that all the orders and findings in the proceedings in the said petition are null and void." This also the court refused to give, and denied the motion. To these refusals to rule and to the ruling actually made the respondent excepted. It is doubtful whether this last request, fairly construed, is intended to cover any other ground for the nullity of the acts of the court except that arising from the alleged disqualification of the judges. The respondent's brief, however, touches upon some other reasons why the acts are null and void, but even if he relies upon any such other reasons they raise only such questions as have been heretofore determined in this case, or such as are no longer open to him at this stage. The only question open to him now is whether the judges being honorary members of the incorporated bar association were thereby disqualified to act.

It is urged by the prosecution that even this is not now open to him; that, notwithstanding his affidavit that he was ignorant of the relation until after the last rescript from this court, he has not shown due diligence in ascertaining the facts about the association and the relation of the judges to it. But we are not inclined to decide the case upon so narrow a ground, even if it were possible to do so. The question is likely to arise in the future, and for the information and guidance of the members of the courts who may be called to act in similar cases it is better that it should be squarely met, duly considered and finally settled.

There is substantially no dispute about the material facts. The association was incorporated under the laws of this Commonwealth. St. 1886, c. 22. This statute (§ 1) provides that the

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members of the Bar Association of the City of Boston heretofore an unincorporated association, and all persons who shall hereafter be associated with them, shall be a body corporate under the same name, "for the purpose of promoting social intercourse among the members of the bar; of insuring conformity to a high standard of professional duty; and of making the practice of the law efficient in the administration of justice;" that (§ 2) for attaining the objects and carrying into effect the purposes of the corporation it may acquire, receive and hold real and personal estate, including a suitable building, library and furniture, not exceeding $500,000 in value; that (§ 3) it may adopt a constitution, by-laws and rules for the admission, government, suspension and expulsion of its members, the collection of fees, the election of officers and defining their duties, and for the management of the affairs of the corporation; and that (§ 4) all interest of any member shall terminate and vest in the corporation upon his ceasing to be a member "by death, resignation, expulsion or otherwise."

By the constitution it appears that (art. 3) every member must be an attorney. The constitution further provides (art. 4) for the appointment of various officers and committees, among which is a committee on grievances, and defines their respective duties; also that (art. 6) there shall be an admission fee and an annual fee. The method of dealing with a person accused of professional misconduct, whether or not he be a member of the association, is set out partly in the constitution and partly in the by-laws. So far as material to this case it is substantially as follows: The complaint is not laid before the association but is referred to the committee on grievances consisting of seven members, who after such hearing as they deem expedient shall report the facts and their recommendations to the council, a larger committee consisting of at least twenty-one regular members including the president, vice-president, treasurer and secretary, and shall thereupon institute such proceedings against offenders as the council may order. The committee on grievances shall keep a record of their proceedings, which shall not be shown to any person not a member of the association, "except that any member of the bar not a member of the Association shall be entitled to an examination of any proceedings of the

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committee affecting him." All meetings of the committee on grievances and of the association shall be private, and the cost of all proceedings before this committee shall be paid by the treasurer of the corporation on the order of the chairman of the committee. By-law No. 3. The committee shall institute and carry on such proceedings against offenders, whether or not members of the association, and to such extent as the council or the association may order, and shall employ suitable counsel or agents for that purpose, the cost of such proceedings to be paid as in the case of the cost of hearings before the committee on grievances. Const. art. 4, § 7, Part III.

One of the purposes of the incorporation is "to insure conformity to a high standard of professional duty," and one of the methods adopted to this end is a systematic course of procedure for the detection and disbarment of unworthy attorneys, whether members of the association or not. Without stopping to dwell upon the features of this system, it is sufficient to say that in devising and pursuing it the association is engaged in a praiseworthy work, and that the system seems well calculated as well to protect the reputation of the person against whom an unjust complaint is made as to detect and expose the person justly accused.

The association has a large library and commodious rooms. Among its active members are many of the prominent members of the bar in this vicinity. There are no shares of stock and no pecuniary profits. The relation of honorary members is thus set forth in art. 3 of the constitution: "Any member of the Association who may become a judge or justice of any court of record, and all other members of the Supreme Judicial and Superior Courts, shall be, while they shall hold such office, honorary members of the Association, and shall be entitled to all its privileges, except that of voting, and shall be exempt from payment of dues." Such is the association and such is its method of procedure on charges of unprofessional conduct. Such also is the relation which the honorary members sustain to it.

The petition in this case was filed in the name of this association. The heading is as follows: "Bar Association of the City of Boston v. Peter J. Casey. Petition for Disbarment." It alleges that the respondent was duly admitted to the bar, that he has

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been guilty of gross misconduct, giving a detailed account of the same, and ends with the prayer "that the said Casey be removed from the office of attorney at law in this Commonwealth, or that the court may make such further order in the premises as it shall deem expedient in the interests of the public welfare;" and it is signed "Bar Association of the City of Boston, by" its attorneys. It was the petition of the association, and there is no dispute that it was drawn up and filed under its authority.

Under these circumstances the respondent contends that every honorary member of this association was disqualified to act in this case. In support of that contention he says that this is a case in which the parties are two, the association on one side and he on the other; that every member of the association, whether regular or honorary, is therefore interested in the result, and is in substance a plaintiff, and that no man can be both judge and party in the same case.

It may be at once conceded that if the respondent's premises are correct his conclusion would be the natural logical sequence. But the premises are not correct. They are based upon an entire misconception of the nature of the proceeding. This is not a proceeding between two parties where the court is asked to adjudicate conflicting claims as to some right, corporeal or incorporeal, and where a decision favorable to one party is necessarily to that extent unfavorable to the other. It is rather in the nature of an inquest or inquiry as to the conduct of the respondent. In the result of this inquiry the association has no interest. It can gain nothing nor can it lose anything whatever may be the result. It simply calls the attention of the court to the alleged misconduct of an attorney, not for the purpose of obtaining redress of any grievance suffered by itself, but only that the court, if so disposed, may inquire into the charge and act accordingly. Such this petition plainly is upon its face. It sets forth no wrong done to it; it asks for no relief. The prayer at the end of the petition does not ask for such a decree as justice and equity may require as between the association and respondent, but in substance for such an order as the court shall "deem expedient in the interests of the public welfare."

And such is the proceeding in reality. An attorney at law is not merely a member of a profession practising for personal gain,

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nor is he on the other hand a public officer. He is an officer of the court. *Ex parte Garland*, 4 Wall. 333. *Petition of Splane*, 123 Penn. St. 527, 540. The court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney. A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer. As stated by Andrews, C. J., in *Fairfield County Bar* v. *Taylor*, 60 Conn. 11, 15, "[The proceedings are] an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit." In that case the petition or complaint was filed by a committee of the Fairfield County bar, and the following language was used by Andrews, C. J.: "Neither the whole bar of Fairfield County nor its committee were parties to an action in any proper sense. They were not prosecuting any matter of their own. They were not plaintiffs. They were performing their sworn duty to the court by bringing to its knowledge the misdoing of one of its agents." This is an accurate statement of the relation sustained to this case by the petitioner. It has no control over the proceedings, nor any rights as to them, not even to an order of notice. The question whether any action shall be taken on the petition and, if so, what, is entirely within the discretion of the court. From the moment of the filing of the petition, the petitioner in law dropped completely out of the case, and the matter was entirely in the hands of the court to make the inquest on its own account and to such extent as it saw fit. And Mr. Hill in his subsequent acts, either in the preparation of the evidence, putting it in at the hearing, or addressing the court, was in law not acting for and in behalf of the association, but as an officer of the court, by the authority expressly or impliedly conferred by it upon him. And that is so although the formal order authorizing Mr. Hill "to prosecute the inquiry and proceedings in relation to said petition; such authorization to take effect from the date of the filing of the petition," was not entered upon the record until February 25, 1907. The expenses of the hearing were payable out

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of the county treasury, R. L. c. 165, § 44, *Burrage* v. *County of Bristol*, 210 Mass. 299; and they were so paid.

"Usually [proceedings for disbarment] are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in other cases, by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made by a master without issuing any process whatever, and on the coming in of his report will cause his name to be stricken from the roll." Bigelow, C. J., in *Randall, petitioner*, 11 Allen, 473, 479, citing Bac. Abr. Attachment, A, Attorney, H. and cases therein cited. *The King* v. *Southerton*, 6 East, 126, 143. *In the matter of Elsam*, 3 B. & C. 597; *S. C.* 5 D. & R. 389. See also *Ex parte Wall*, 107 U. S. 265; *Ex parte Steinman & Hensel*, 95 Penn. St. 220; *Randall* v. *Brigham*, 7 Wall. 523.

The nature of the present proceeding is not affected by the fact that through all its stages it has been entitled "*Bar Association of the City of Boston* v. *Casey*." This is a mere matter of designation common in such a case in this Commonwealth. See *Cowley* v. *O'Connell*, 174 Mass. 253; *Boston Bar Association* v. *Greenhood*, 168 Mass. 169; *Boston Bar Association* v. *Hale*, 197 Mass. 423; *Boston Bar Association* v. *Scott*, 209 Mass. 200. In other jurisdictions a case for disbarment may be entitled either *Ex parte* or *In re* or *In the matter of* — followed by the name of the accused. And such a title seems preferable as indicating more accurately the real nature of the proceeding.

We entertain no doubt that the several justices of the Superior Court, whose right to sit has been challenged by the respondent, of their own motion upon information giving them reasonable cause to believe that the respondent had been guilty of professional misconduct, could have conducted an inquiry into the matter either through a master or in open court, and that it is

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immaterial upon the question of their qualification that the information came by the petition or from whatever way it reached them.

Exceptions overruled; orders affirmed.

J. S. Richardson & P. J. Casey, for the respondent.

A. D. Hill, (*A. G. Grant* with him,) for the petitioner.

HARVEY P. L. PARTRIDGE *vs.* AMERICAN TRUST COMPANY.
ELLA F. BOOTHY & others *vs.* SAME & another.

Suffolk. December 5, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Trust, Duties of trustee.

Where a trust company holds as trustee assignments of mortgages of real estate to secure the debenture bonds of an investment company, under a trust agreement which explicitly prescribes the duties of the trustee and provides, as the only requirement in regard to recording the assignments of mortgages, that upon default by the investment company the trustee, upon the request in writing of the holders of a majority of the bonds in default, shall record at once "all unrecorded assignments to it of mortgages held by it under the provisions thereof," and shall take all necessary steps to convert into cash the securities held by it to secure the payment of the bonds in default, and further provides that the trustee "shall be responsible only for gross negligence or wilful default," the trustee is not liable to the bondholders for a loss suffered from the fraudulent acts of officers of the investment company in discharging some of the mortgages and misappropriating the proceeds for their own use, which were made possible by the failure of the trustee to record the assignments of these mortgages when no request to do so had been received by it from the holder of any of the bonds.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court respectively on March 23 and May 17, 1911, the last bill being amended on September 1, 1911, the first bill by the receiver of the property of the Debenture Investment Company against the American Trust Company, and the second bill by holders of the debenture bonds of the Debenture Investment Company, for themselves and such other holders of said bonds as might be entitled to join, against the American Trust Company and the Boston

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Safe Deposit and Trust Company, its predecessor as trustee under the agreement securing said bonds.

In the first case *Loring*, J., made an interlocutory order sustaining a demurrer of the defendant on the ground that the receiver was not the proper party to bring the bill, and ordering that unless the bill should be amended within a time named a decree should be entered dismissing the bill with costs. No amendment having been made, on May 12, 1911, a final decree was made dismissing the bill, from which on May 15, 1911, the defendant appealed. Thereafter the second bill was filed. The cause of action relied upon was the same in both bills. The defendants severally demurred to the second bill as amended. This case came on to be heard before *Morton*, J., who reserved it upon the bill and the demurrers of the two defendants for determination by the full court. The terms of reservation have become immaterial. The question in regard to the liability of the defendants is stated in the opinion.

The trust agreement for securing the bonds in question was dated November 12, 1892, and was made between the Debenture Investment Company and the Boston Safe Deposit and Trust Company. The last named company acted as trustee until July, 1894, when it resigned and the American Trust Company, then called the American Loan and Trust Company, was appointed trustee in its place. In 1894 a trust agreement was made between the Debenture Investment Company and the American Loan and Trust Company. The provisions quoted and described in the opinion were contained in both agreements.

H. T. Richardson, for the plaintiffs.

S. H. Pillsbury, (*R. Y. Fitzgerald* with him,) for the American Trust Company.

C. K. Cobb, for the Boston Safe Deposit and Trust Company.

BRALEY, J. The plaintiffs are respectively the receiver, and a large number if not a majority of the bondholders of the Debenture Investment Company, a foreign corporation having its place of business in this Commonwealth, and organized to lend money on unincumbered real estate, and to issue and dispose of debenture bonds, the payment of which was to be secured by assignment of the mortgages to trustees. It appears that in the usual course of business mortgages with the accompanying notes

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as shown by the bills of complaint were duly transferred under the trust to the American Trust Company, and later to its successor in the trust, the Boston Safe Deposit and Trust Company, each of which thereupon became vested with the title, control and disposition of the securities subject to the right reserved by the debenture company as mortgagee to receive the accrued interest, and to withdraw any mortgage, if securities of like character and amount were given in substitution, until default was made upon the bonds. By the neglect and failure of the trustees severally to record some of the assignments, the record title to these mortgages apparently remained in the debenture company, and certain of its officers taking advantage of this omission, and purporting to act for it, discharged them upon payment, and appropriated the proceeds to their own use. The defalcation having rendered the company insolvent, a receiver was appointed, and, without any averments that the discharges have been recorded or that the mortgagors were ignorant of the assignments, the substantial charge in each suit is that under the trust the securities were to be preserved for the benefit of the bondholders, and that the failure of the acting trustee to record the assignments was a breach of duty for which it is liable in money damages to the extent of their impairment in value, or for the entire amount if the mortgages have become unenforceable. But, if the defendants were bound to know their powers and faithfully to perform their duties, they are not accountable unless their failure to act was in violation of the provisions of the trust. *Ashley* v. *Winkley*, 209 Mass. 509. If the agreements had been silent as to any requirements for the protection of the title under our laws for the registration of conveyances of real property from the contingency of a purchase of the premises for value without notice after the discharge had been recorded, and had contained no reference exempting him from liability except for gross negligence or wilful default, a trustee, whose duty required him to protect the interests of bondholders by properly safeguarding securities of this nature, might be found by his neglect of precautions which an ordinarily careful business man would have taken, to be responsible for the delinquency. Pub. Sts. c. 120, § 4. R. L. c. 127, § 4. *Willcox* v. *Foster*, 132 Mass. 320. *Watson* v. *Wyman*, 161 Mass. 96. *Biggerstaff* v. *Marston*, 161 Mass.

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101. *Swasey* v. *Emerson*, 168 Mass. 118. *Ashley* v. *Winkley*, 209 Mass. 509. The agreements, however, are not silent, but explicitly prescribe the duties of the trustee, and nothing is left to implication. By the fourth article the trustee was not required except upon default by the debenture company, and then only upon request in writing "of the holder or holders of a majority of the debentures in default," to record at once, "all unrecorded assignments to it of mortgages held by it under the provisions thereof," and by the fifth article it "shall be responsible only for gross negligence or wilful default." A further provision of the fourth article is, that upon such request, the trustee shall "immediately take any and all necessary steps to convert into cash, by sale or otherwise, the securities held by it to secure the payment of the debentures in default . . . and shall apply the proceeds" after deducting all costs and expenses of collection toward the payment thereof. Viewed in the light of what has happened it may be that the rights of the bondholders were insufficiently protected, but until they have complied with the terms of this article, and the trustee has neglected or refused to perform, neither defendant can be charged with unfaithful administration, or compelled to account generally. The allegations which the demurrers admit to be true having failed to set forth any breach of duty by the defendants, no case is stated for equitable relief, and the other grounds relied on by the demurrants need not be considered. The decree in the first case must be affirmed, and in the second case the bill must be dismissed.

Ordered accordingly.

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ALFRED A. ADAMS & another *vs.* EDWARD E. ADAMS, trustee, & others.

Middlesex. December 5, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Probate Court, Appeal. *Absentee. Constitutional Law.*

Upon a petition under St. 1905, c. 326, for the appointment of trustees and the distribution among them of property held by a trustee under a will for an absent beneficiary who has been unheard of for more than fourteen years, a guardian *ad litem* appointed in the proceedings to represent such absentee and others and the trustee holding the fund have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution and thus to bring in question the constitutionality of the statute.

St. 1905, c. 326, providing that, where a trustee appointed under a will by a Probate Court of this Commonwealth holds property for the benefit of an absent beneficiary who has been unheard of for more than fourteen years, such court, upon a petition under the statute and after the proceedings there prescribed, may order the distribution of the property to the persons as trustees who would be entitled to such trust estate if such absentee had died intestate within this Commonwealth on the day fourteen years after the date of his disappearance, and that each of such new trustees shall give a bond, on which no action can be brought by such absentee or any person claiming under him after the expiration of six years, is not in conflict with the Fourteenth Amendment of the Constitution of the United States or with any provision of the Constitution of this Commonwealth. Nor is there anything invalid in the provision of § 10 of the statute that it shall apply to existing trusts.

APPEAL from a decree of the Probate Court for the County of Middlesex on a petition under St. 1905, c. 326, asking for the appointment of trustees and the distribution among them of a trust estate held by the respondent Edward E. Adams, as trustee under the will of George S. Adams, late of Belmont, for the benefit of George Franklin Adams and others.

The appeal was heard upon an agreed statement of facts by *Hammond*, J., who made a final decree "that the decree of the Probate Court appealed from and dated February 13, 1911, declaring that George Franklin Adams is an absentee within the meaning of chapter 326 of the Acts of the year 1905 and ordering that the funds in the hands of Edward E. Adams, trustee

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under the will of George S. Adams, deceased, be transferred in equal shares to Alfred A. Adams, Emily P. Robbins and Edward E. Adams, is hereby affirmed and the case remitted to the Probate Court for further consideration."

The respondent Edward E. Adams, trustee, appealed. The guardian *ad litem* for George Franklin Adams and others, also appealed.

W. N. Buffum, (*F. M. Copeland* with him,) for the respondent, Edward E. Adams, trustee.

H. L. Boutwell, (*E. P. Miller* with him,) for the petitioners.

RUGG, C. J. This is a petition for the appointment of trustees and the distribution among them of a trust estate in accordance with the provisions of St. 1905, c. 326. The salient features of that act are that after fourteen years from the date of disappearance, absconding or absence from the State of a beneficiary of a trust created by will, wherein a trustee has been appointed by a Probate Court of this Commonwealth, any person who would be interested in such trust, if the absentee was dead, may petition the Probate Court for a transfer of the trust fund and its accumulations "to the persons as trustees who would be entitled to such trust estate if such absentee had died within this Commonwealth on the day fourteen years after the date of his disappearance, and in the proportions to which each would be entitled."

Elaborate and minute provisions are made for a full description of the estate and of all persons alleged to have an interest in it and for full service of the notice thereupon, (which shall contain the substance of the petition,) personally upon all parties resident in the Commonwealth, and by publication in one or more newspapers within the Commonwealth within thirty days after the order, and in the place of the last known residence or abiding place of the absentee if within the United States, within sixty days after the order, the return day of which shall be not less than six months after the order. All the world are made parties and shall be concluded by the decree. A guardian *ad litem* is to be appointed for the absentee and for all others under disability or absent or unascertained or not in being who may have an interest in the fund. Each of the new trustees is required to give a bond, with or without sureties, as the court may direct, conditioned to repay to the absentee if alive, or the persons claiming under

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him, the fund received by such trustee less his disbursements and compensation, but all actions in any form in behalf of the absentee to recover the fund are barred after six years from filing the bond. The original trustee is barred of all further liability upon payment to the new trustees thus appointed. In substance, the statute provides that, where a trust created by will is held by a trustee appointed by our courts, and the beneficiary has been absent and unheard of for fourteen years, the fund may be distributed among his heirs at law as if he had deceased at the end of the fourteen years from disappearance, upon their giving bond therefor.

The absentee did not appear in the case at bar. The guardian *ad litem* appealed from the decree of the Probate Court, but the only argument has been presented by the original trustee. The interests of these persons appear to permit them to raise objections to the decree. *Southern Railway* v. *King*, 217 U. S. 524, 534.

The constitutionality of the statute is attacked on the ground that it deprives the absentee of his property without due process of law in contravention of the Fourteenth Amendment to the Federal Constitution and does not afford him the protection in his property which is guaranteed by our own Constitution. Treating both these contentions in their broader aspects, they are concluded in favor of the petitioner by *Nelson* v. *Blinn*, 197 Mass. 279; *Blinn* v. *Nelson*, 222 U. S. 1; *Attorney General* v. *Provident Institution for Savings*, 201 Mass. 23; *Provident Institution for Savings* v. *Malone*, 221 U. S. 660; *Cunnius* v. *Reading School District*, 198 U. S. 458; *S. C.* 206 Penn. St. 469.

The essence of these decisions is that property abandoned by its owner may be taken into custody of law and distribution of it declared among those who would be the heirs of the absentee if he were deceased, all under reasonable limitations as to length of absence, precedent notice and safeguards for the security of the property.

These cases have decided that fourteen years of absence and inattention to property is a sufficient time to warrant a finding of abandonment. That the property made the subject of this statute is not a physical derelict, but in the hands of a trustee is of no consequence. Such property may be none the less abandoned by the beneficial owner. It can stand on no better footing in this regard than deposits in savings banks, which were under

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discussion in *Attorney General* v. *Provident Institution for Savings*, 201 Mass. 23. In this regard, statutes like the one here in question are statutes of limitations, and do not offend against constitutional guarantees. The limitation against the heirs at law, as new trustees, is six years so that the absentee is not finally barred of the right to claim his property until the expiration of twenty years. See *Mulvey* v. *Boston*, 197 Mass. 178.

It cannot be urged successfully in the light of these adjudications that the present statute is an attempt to extinguish arbitrarily the property rights of the absentee. The requirement as to notice in § 3 of the act is ample in view of similar provisions under consideration in the cases cited.

The security provided for the integrity of the fund is a bond with or without sureties, as the court may require, from each of the heirs at law as new trustee, with liability on the part of the new trustee only for gross negligence in the management of the fund. Although this is a lower degree of skill than is ordinarily exacted of trustees, there is no constitutional inhibition against its establishment by the Legislature in a class of cases like the present. There is an unqualified responsibility on the part of the trustee for the period of six years secured by the bond. The degree of security for the fund after the period of abandonment has expired is for the determination of the Legislature, within reasonable limits, which cannot be said to be transgressed in the present instance.

While the present act in some respects is unlike those under consideration in previous cases, these appear to be immaterial differences. The absentee is not barred of his action against the new trustees until the expiration of six years from their appointment, a far longer time than is commonly provided. The appointment of those who would be the heirs at law of the absentee as trustees and the division of the property among them, as in distributive shares, is not deprivation of property without due process of law, nor a failure to protect property in accordance with standing laws. The establishment of reasonable rules for administration of trusts under wills cannot be treated as beyond the power of the Legislature. In cases arising under this statute, the property is already in the hands of a trustee appointed by the court. Being in the possession of a responsible officer of the court, the machinery of a receiver, as provided in R. L. c. 144, is unnecessary.

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The act in § 10 is made applicable expressly to existing trustees. This is not invalid. The period of absence required before there can be abandonment is fourteen years. The principle is that property withdrawn from the ordinary channels of use by an owner who cannot be found, should be distributed as an intestate estate. This principle having been determined by the Legislature to be salutary, there is no countervailing reason why it should not apply to property already abandoned or in process of abandonment as well as to that which may be abandoned in the future. This retroactive feature involves no unconstitutional exercise of legislative power. *Wilson* v. *Iseminger*, 185 U. S. 55. *Soper* v. *Lawrence Brothers Co.* 201 U. S. 359, 368. *Blinn* v. *Nelson*, 222 U. S. 1.

The distinction between *ex post facto* and retroactive laws is thoroughly established. The latter are not forbidden by either the State or Federal Constitutions. While statutes ordinarily are given only a prospective operation, yet where by express terms they are made to apply to existing conditions, that of itself does not render them void if not open to objection in other respects. *Wallace* v. *Adams*, 204 U. S. 415, 422. *League* v. *Texas*, 184 U. S. 156, 161. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152. *In re Mayor & Aldermen of Northampton*, 158 Mass. 299. *Danforth* v. *Groton Water Co.* 178 Mass. 472. *Rogers* v. *Nichols*, 186 Mass. 440. *Converse* v. *Ayer*, 197 Mass. 443, 454.

Decree of Probate Court affirmed.

GEORGE E. WOODBURY, administrator with the will annexed, (afterwards by amendment FREDERICK G. ROBY, administrator with the will annexed,) *vs.* JOSEPH O. HAYDEN & others.

Middlesex. December 6, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Devise and Legacy. Trust.

The will of an unmarried woman about forty years of age, after disposing of a cemetery lot, provided as follows: "The balance of my estate both real and personal I bequeath to H. The same to be used as far as necessary for the support and maintenance of my aunt A." The value of the estate was about $6,000.

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H was a county treasurer, in whose office the testatrix was employed as a typewriter and general assistant. She made her home with the aunt named and provided the funds for it. She had a father living in a distant State, with whom she was on friendly terms but who did not support her after she was ten years of age. No reason appeared why she should make H her residuary legatee. *Held*, that H was merely a trustee and took no beneficial interest, and that, upon the death of the aunt of the testatrix, whatever remained of the trust fund should be disposed of as intestate property.

BILL IN EQUITY, filed in the Probate Court for the County of Middlesex on August 3, 1909, and amended on May 15, 1911, by the administrator with the will annexed of the estate of Lennette A. Woodbury, late of Cambridge, for instructions.

The bill was filed as such administrator by George E. Woodbury, the father of the testatrix. He died on March 17, 1910, and Frederick G. Roby was appointed administrator with the will annexed in his place. On May 15, 1911, an amendment to the bill was allowed by the Probate Court substituting Frederick G. Roby as plaintiff and making the administrator of the estate of George E. Woodbury a defendant, also making Joseph O. Hayden a defendant as trustee under the will of Lennette A. Woodbury, he previously having been a defendant only personally.

In the Probate Court *McIntire*, J., made a decree that the defendant "Joseph O. Hayden took the residue of the property and estate of said deceased upon a trust, to use and apply the same as far as necessary for the support and maintenance of Almira Augusta Woodbury, during her life; that said Almira Augusta Woodbury, the beneficiary under said trust, has deceased, leaving an unexpended balance of the trust fund so created; and that such unexpended balance remaining after the termination of the life estate was not disposed of by said will but devolves, under a resulting trust, upon the heir at law and next of kin of the said testatrix."

Joseph O. Hayden individually and as trustee appealed.

The appeal came on to be heard before *Sheldon*, J., who reserved the case upon the pleadings and an agreed statement of facts for determination by the full court.

The facts are stated in the opinion. The will was as follows:

"Know all men by these presents that I, Lennette A. Woodbury of Cambridge in the County of Middlesex and Commonwealth of

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Massachusetts, being of sound and disposing mind make this my last will and testament. After the payment of my just debts and funeral charges I give devise and bequeath to Maude Mary Barnes of Somerville County and State aforesaid, lot number 3019 Willow Path Cambridge Cemetery. The balance of my estate both real and personal I bequeath to Joseph O. Hayden, of Somerville County and State aforesaid. The same to be used as far as necessary for the support and maintenance of my Aunt Almira Augusta Woodbury of Cambridge County and State aforesaid

"In testimony whereof I hereunto set my hand and seal this fifth day of February A. D. 1907."

H. P. Johnson, for Joseph O. Hayden individually and as trustee under the will of Lennette A. Woodbury.

A. S. Hall, for A. M. Haines, administrator with the will annexed of the estate of George E. Woodbury.

HAMMOND, J. The sole question is whether Hayden took the residue upon a trust, or subject to a trust. If upon a trust, then he took no beneficial interest, and the purposes of the trust having been accomplished, the remainder stands as intestate property; if subject to a trust, the beneficial interest was in him subject to a legal duty to use the same so far as necessary for the support and maintenance of Mrs. Woodbury the aunt of the testatrix, and that duty having been performed he holds the remainder absolutely.

The case is before us upon the pleadings and agreed facts. The testatrix was born in Cambridge in this Commonwealth about 1865. When she was three years old her mother died and the care of her was reposed in her aunt Mrs. Woodbury, but her father and her uncle (the husband of Mrs. Woodbury) and the testatrix had a common home for some years. Her father married in 1875 and for seven years thereafter did not see or communicate with her. The wife died, however, "some twenty years ago" and ever afterwards the father and daughter were on friendly terms, he living in California and she in Cambridge. They saw each other very seldom, she visiting him however once in California. He did not support her after she was ten years old, although after the death of his second wife he at her own solicitation made her several presents.

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For many years she worked in the office of Mr. Hayden, the treasurer of Middlesex County, as a typewriter and general assistant, and was much relied on for general efficiency. She had knowledge of many business affairs of Mr. Hayden, and he had known of her investments. She inherited from her mother about $5,000, and she left an estate of about $6,000. She had a home with her aunt Mrs. Woodbury, the aunt conducting the domestic affairs and she providing the funds.

At the time of making the will she was about forty years of age, in ill health and on the eve of a visit to her father in California. She expected to return soon, and her purpose in going there was not only to visit her father, but also to obtain from him about $10,000 to invest in an apartment house in Massachusetts.

On February 5, 1907, she sat down apparently unaided to make this will. She seems to have been a capable and self reliant woman. She had no blank form. It is apparent from the opening sentence as well as from the other parts of the will, that she had some knowledge of testamentary phrases. After disposing of a cemetery lot she proceeds as follows: "The balance of my estate both real and personal I bequeath to Joseph O. Hayden, of Somerville County and State aforesaid. The same to be used as far as necessary for the support and maintenance of my Aunt Almira Augusta Woodbury of Cambridge County and State aforesaid." And there she stops. She apparently thinks she has done all she set out to do. What did she set out to do? Was it her intent simply to provide for her aunt, then seventy-two years of age, so far as the property should be needed for that purpose, or was it her intent to give all she had to Mr. Hayden subject only to the needs of her aunt? The question although narrow is close and difficult. Without reciting the considerations urged by the respective counsel it is sufficient to say that the arguments appear very evenly balanced, and whichever direction is taken the path is not entirely smooth.

It is plain that while she wanted to have her property used so far as necessary for the support and maintenance of her aunt, she was not willing to let her aunt have the control of it, but desired that it should be in the hands of a trustee. The aunt's comfort was the one thing to which all else should be subordinate, but she was not to have control. There was occasion therefore for

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the appointment of some one to take care of the property and to pay it out as occasion required for the aunt's necessities, and the testatrix knew all this. She thought of Hayden as a proper man to do this and she appointed him at least for that purpose. Did she mean anything more? She knew that Hayden held a responsible official position and she was familiar with his business methods and he with hers. There were excellent reasons why she should trust him to manage the property, but no reason appears why she should make him her residuary legatee. He was a stranger in blood; she does not appear to have been assisted by him at any time, and there are no ties, either of affection or otherwise, suggested, except those naturally arising out of the relation of employer and employee continued for years. We do not regard the fact that there was a period between the words of gift to Hayden and the clause in favor of the aunt as of very much significance. It is plain that the clause relating to the aunt is elliptical and cannot be understood except by reference to the preceding sentence. And we think that they should be read in substance as one sentence.

Upon the whole, we think that the will, read in the light of all the circumstances, indicates that the sole purpose of the testatrix in placing the residue in the hands of Hayden was that as trustee he should see to it that so far as necessary it should be used for the support and maintenance of her aunt, and that she did not intend that he should have any personal interest in it. The trust having ended, whatever remains of the trust fund should be disposed of as intestate property. For a discussion of some aspects of the law on this general subject see *Buffinton* v. *Maxam*, 140 Mass. 557; *Buffinton* v. *Maxam*, 152 Mass. 477; *McElroy* v. *McElroy*, 113 Mass. 509.

Decree of the Probate Court affirmed.

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GREENFIELD SAVINGS BANK *vs.* COMMONWEALTH.

Suffolk. December 6, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Savings Bank. Tax, Excise.

A savings bank is not subject to an excise tax under St. 1909, c. 490, Part III, § 21, computed upon the average amount of its deposits for a period of six months during which the bank commissioner had taken and retained possession of its property and business under authority of St. 1910, c. 399, but had not published or sent out notice for the presentation of claims against the bank in accordance with § 8 of that statute.

PETITION against the Commonwealth, filed in the Supreme Judicial Court on May 22, 1911, by the Greenfield Savings Bank, through the bank commissioner of the Commonwealth, under St. 1909, c. 490, Part III, §§ 70, 71, for the sum of $4,302.07 paid by the petitioner, which was assessed as a tax under § 21 of the same Part of the same chapter computed upon the average amount of its deposits for the six months preceding November 1, 1910.

The case came on to be heard before *Sheldon,* J., who at the request of the parties reserved it upon the petition, the answer of the Commonwealth and an agreed statement of facts for determination by the full court.

D. Malone, (*G. S. Fuller* with him,) for the petitioner.

F. T. Field, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. This is a petition under St. 1909, c. 490, Part III, §§ 70, 71, for the abatement of a tax assessed upon the petitioner under § 21 of said act, upon the average amount of its deposits for the six months preceding November 1, 1910.

The petitioner, a savings bank incorporated under the laws of this Commonwealth, was restrained in 1909 from receiving deposits and from exercising certain powers. In June, 1910, the bank commissioner, acting under authority of St. 1910, c. 399, took, and has since retained, possession of the property and business of the petitioner because he had reason to conclude that it was in an unsound and unsafe condition and could not expe-

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diently continue its business. He has not published or sent out notices in accordance with § 8 of said c. 399 requiring proof of claims against the petitioner. The question is whether a savings bank corporation is liable to the tax under these circumstances.

The tax provided by the statute is an excise tax and, speaking generally, such taxes are valid. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. *Provident Institution* v. *Massachusetts*, 6 Wall. 611. In *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, it appeared that the bank was in the hands of receivers, perpetually prohibited from doing the business for which it was chartered and deprived of the right to exercise its franchise, and thus had practically ceased to exist, and it was held that no tax could be assessed.

In *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526, the bank had been enjoined from receiving deposits or paying depositors, from conveying real estate, except on terms approved by the bank commissioners, was limited in making investments to certain securities, but otherwise its officers were permitted to exercise their judgment in preserving and caring for the property of the bank, and it was held liable for the tax. The case at bar is not covered precisely by either of these decisions.

It is necessary to examine critically what it is which is made subject to the excise tax. The language of the statute, namely, that "Every savings bank . . . shall pay . . . an annual tax of one half of one per cent on the amount of its deposits" is not decisive. In *Attorney General* v. *Massachusetts Pipe Line Gas Co.* 179 Mass. 15, at page 19, it was said by Knowlton, J., in denying the claim that no tax could be assessed so long as the corporation had not done business, nor done all that the law required before it could legally commence business: "The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses." If the test here stated is applied to the facts at bar, there is no liability for the tax because the corporation cannot resume business at will. It can only do so when it is deemed safe to do so by the bank commissioner or the court. The bank commissioner, under the

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terms of the statute, took possession of all the "property and business" of the bank. This description includes the franchise, for a franchise is a legal estate and not a mere naked power vested in the corporation. *Society for Savings* v. *Coite*, 6 Wall. 594, 606. The bank had nothing left in its possession except the fragmentary privileges described in §§ 13 and 14 of the act to apply to the court and to call a meeting of the incorporators, and appoint agents for liquidation. There is left to it none of the franchise rights which were decisive in *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526. The bank commissioner took possession of the property and business of the petitioner, not as receiver appointed by a court, but as a public officer, with many of the powers of a receiver and in most respects subject to the direction of the court to carry out a legislative policy for liquidation established as to savings banks whose depositors' interests are not being properly conserved. This policy does not necessarily contemplate a winding up of the corporate existence of every institution of which the bank commissioner may take possession. Under § 2 of said c. 399, he is to retain possession "until the bank shall resume business or until its affairs shall finally be liquidated." St. 1910, c. 622, § 11, points one way in which resumption of business might be accomplished by a scaling down of deposits. But in general the policy established by the act is that of final liquidation. In carrying out this legislative policy the bank commissioner does not avail himself of the powers conferred by the act of incorporation, as does the receiver of a public service corporation or a private corporation authorized to continue the business, but acts entirely in pursuance of the powers created by the statute. The bald existence of the corporation remains, but all its other substantial rights and privileges are in suspension. Whether these will be resumed or the corporation be extinguished is matter of doubt, although the main part of the provisions of said c. 399 look toward final liquidation.

The mere capacity to exist as a corporation is a franchise. *California* v. *Central Pacific Railroad*, 127 U. S. 1, 40. It has been said that an excise may be laid upon this even when its exercise is enjoined. *In re United States Car Co.* 15 Dick. 514. The more general rule is that there must also be either an actual exercise or a right to exercise the privileges conferred by the

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State. *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 145, 150. *Central Trust Co.* v. *New York City & Northern Railroad*, 110 N. Y. 250, 258. *People* v. *Tax Commissioner*, 174 N. Y. 417, 435. *People* v. *Williams*, 200 N. Y. 528. The right of doing business is the commodity which, under our excise tax cases, has been treated as the subject of the tax. *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161, 165. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148, 152. *Boston Elevated Railway* v. *Commonwealth*, 199 Mass. 96. The privilege to transact business appears to have been regarded as an essential requisite to the imposition of the excise tax in *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, 497. This existed to a limited extent in *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526.

The conclusion that there must be a right to exercise the corporate powers before liability for the tax attaches is fortified by the provisions of St. 1909, c. 490, respecting its assessment. Part III, § 22 of that act requires the bank to make a return to the tax commissioner signed and sworn to by its president and treasurer, stating the amount of its deposits on the first days of May and November, and of the average of its deposits for the six months preceding those dates, and imposes a penalty upon the bank for failure to make such return. But the books on which such return must be based have been taken over by the bank commissioner and are no longer available as of right to the officers of the bank. One of the means for collection of the tax is an action of contract, § 61, or an information by the Attorney General, on which an injunction may issue restraining the corporation from doing further business until it is paid, § 62. Neither of these remedies are available against a corporation in possession of the bank commissioner under said c. 399.

It was said by Holmes, C. J., in *City National Bank* v. *Charles Baker Co.* 180 Mass. 40, that the franchise of a corporation in the hands of a receiver was not taxed. However that may be in instances where the franchise is exercised by the receiver, as in receivership of railroads and other public service or business corporations, it applies to a savings bank, of which the bank commissioner has taken possession under said c. 399, even when no perpetual injunction has been issued against resuming its business. The tax is based solely on the value of the franchise "es-

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timated by the extent to which it has used and enjoyed its corporate powers and privileges during the time for which the tax is assessed." *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312, 315.

Such a corporation is not subject to an excise tax when it has no right nor power to exercise its franchise and when its franchise is not in fact exercised by any one in its behalf and interest, even though there is a legal possibility that its corporate functions may be resumed.

Tax illegally exacted; decree for the petitioner with costs.

OLD SOUTH ASSOCIATION *vs.* EDMUND D. CODMAN & others, trustees.

Suffolk. December 7, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Easement, Of light and air. *Contract*, Construction. *Words*, "Premises."

Under an indenture between a corporation owning an open grass plot of valuable land on a street in the heart of a large city and the owner of a high office building in process of construction, granting to such owner for a term of years "an easement of uninterrupted light and air" over the grass plot, reserving a stipulated rent and providing that if "the major part" of "the premises" over which the easement is granted is taken by the city there shall be a reasonable reduction in the rent, a taking by the city of the use of more than half of the surface of the grass plot as described in the indenture for the purpose of the passage of the public on foot and of the building of a small structure not exceeding ten feet in height may be held, in view of the subject matter of the contract and the circumstances attending its making, not to be a taking of a major part of the premises within the meaning of the provision.

A corporation, owning an open grass plot of land on a street in the congested portion of Boston, which adjoined land owned by trustees on which a large office building was in process of construction, made an indenture with the trustees by which the corporation granted to them for a term of years "an easement of uninterrupted light and air over the premises hereinafter described above the level of the grass plot . . . and the right to project over not exceeding five feet of said premises" with cornices and certain other things. A stipulated rent was reserved to be paid "without any reduction on account of any future taking of part of the above mentioned premises by the city of Boston or other public authority for any purpose, . . . but if the whole of

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the premises over which the said easements are hereby extended, or the major part thereof, is taken by the city of Boston or other public authority, or if the substantial enjoyment of the easements hereby created be impaired either by any structure placed on any portion of said premises taken by the city or other public authority pursuant to and in connection with such taking or otherwise," the agreement might be terminated or there should be a reasonable reduction in the rent. When the indenture was made a statute had been passed authorizing the construction by the city of a subway under the street adjoining the described premises. Such a subway was built by the city, for which takings were made of the described premises, of which the highest level was ten feet above the surface of the earth and the lowest level was about forty feet below such surface. The taking above the surface was only of a small area, and over the rest of the area described in the taking the right taken was that of passage for the public on foot. The whole of the surface covered by the taking was about three quarters of that of the described premises. The exclusive use of all areas above the level of the takings was reserved to the corporation as owner. There was no substantial interference with the easement granted to the trustees. The trustees contended that a "major part" of "the premises" had been taken and that under the terms of the indenture they were entitled to a reasonable reduction in the rent to be paid. *Held*, that the words must be interpreted in view of the subject matter of the contract and the purpose of the parties, and that here a taking of a major part of the premises must mean either an absolute taking in fee of more than half of the premises as measured on the surface of the earth, or such a taking of less than a fee as would authorize constructions over the larger part of the surface area high enough to interfere with the easement, and that the taking of the use of more than half of the surface in the manner above described was not a taking of the major part of the premises within the meaning of the contract, so that the trustees were entitled to no reduction in the amount of rent to be paid.

BILL IN EQUITY, filed in the Superior Court on July 2, 1908, and a supplemental bill filed on May 3, 1911, to enforce an agreement to pay rent for an easement of light and air under the terms of an indenture described below. By an order made upon the supplemental bill Moses Williams, Jr., and Francis R. Bangs were made defendants as the trustees of the Old South Building Association and as such trustees the successors to all the property and rights previously held by the trustees of the Old South Building Trust.

In the Superior Court the case was heard by *Pierce*, J., on the bill, answer and replication, and the supplemental bill, the allegations of which the defendants admitted to be true. The judge filed a memorandum as follows: "After a view and a consideration of the testimony introduced at the hearing I find as a fact that the conditions upon which the defendants were granted the right to have a possible readjustment and diminution of

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rent through arbitration have not become existent. I further rule as a matter of law upon the testimony that the plaintiff is entitled to the relief prayed for. A claim may be prepared accordingly."

By order of the judge a final decree was entered, by which the defendants Moses Williams, Jr., and Francis R. Bangs as trustees of the Old South Building Association were ordered to pay to the plaintiff the sum of $22,558.73. The defendants appealed. The evidence was reported by a commissioner appointed under Equity Rule 35.

The indenture containing the agreement sought to be enforced was made on December 20, 1902, between the Old South Association in Boston, a corporation created by St. 1877, c. 222, as party of the first part, and the then trustees of the Old South Building Trust under an indenture of trust dated March 1, 1902, as party of the second part.

The paragraphs containing the material provisions were as follows: "That the said party of the first part doth hereby grant unto the said party of the second part an easement of uninterrupted light and air over the premises hereinafter described above the level of the grass plot on the northerly side of the tower of the Old South Meeting House and the right to project over not exceeding five feet of said premises and to maintain thereover cornices window-sills, blinds, shutters, window-sashes, awnings and like projections on and from the southerly wall of a building on Washington Street in said Boston now in the course of construction for the party of the second part.

"The premises above referred to and over which said easements are granted are situated in said Boston and bounded as follows: Westerly on Washington Street; northerly by land held by the party of the second part for a term of years under said Indenture of Trust ninety-seven and 3/10 (97.3) feet; easterly by the same and southerly by a line coincident with the northerly face of the northerly side wall of the Meeting House extended in a straight line to said Washington Street. The right to maintain eaves, cornices and other ordinary projections of said side wall and to use blinds, shutters and awnings thereon is reserved.

"The easements and rights above granted are to begin on the first day of April 1903 and are to continue until the first day of

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May 1977 provided however that if during the period of this grant the said Meeting House shall be damaged or destroyed in any manner or by any cause whatever or shall be in whole or part taken by right of eminent domain, or under any exercise of 'police power' so-called, so that said Association shall determine that it is not expedient longer to continue the use of the same for the purposes prescribed by its charter and that it is expedient to make a use of the servient premises under its charter inconsistent with their remaining open as herein provided or to sell the same, this agreement may then be terminated by an appropriate notice in writing served by the party of the first part upon the party of the second part and fixing the day for such termination at a date not less than three months from the time of such service.

"And in consideration of said grant the party of the second part pursuant to the authority given it by the provisions of said Indenture of Trust hereby agrees to pay to the party of the first part and its successors or assigns the sum of Six thousand dollars yearly in quarterly payments, the first payment to be made on the first day of July 1903, and at the same rate for any part of a quarter unexpired at the legal termination of this lease, without any reduction on account of any future taking of part of the above mentioned premises by the City of Boston or other public authority for any purpose, or on account of any release or conveyance by the party of the first part of any part thereof for the widening of Washington Street, and it hereby assigns to the party of first part any claim and right of action which it may hereafter have against said city or other public authority for any such taking and any right and title to the land so released or conveyed and any claim to compensation therefor, but if the whole of the premises over which the said easements are hereby extended, or the major part thereof, is taken by the city of Boston or other public authority, or if the substantial enjoyment of the easements hereby created be impaired either by any structure placed on any portion of said premises taken by the city or other public authority pursuant to and in connection with such taking or otherwise, the party of the second part shall have the right at its option either to terminate this agreement upon assigning to the party of the first part any claim and right of action which it may have growing out of such taking, or upon executing such assignment to de-

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mand and receive a reasonable reduction in the annual payment thereafter to be made hereunder, such reduction to be fixed by arbitration if the parties are unable to agree upon the same."

A. D. Hill, (*R. H. Wiswall* with him,) for the defendants.

R. W. Hale, (*F. W. Grinnell* with him,) for the plaintiff.

RUGG, C. J. The plaintiff, being the owner in fee of certain open land next to the Old South Meeting House on Washington Street in Boston and the predecessors in trust of the defendants being the owners of an adjacent large office building then in process of construction and since completed, made an indenture by which the plaintiff granted to the trustees for a term of years "an easement of uninterrupted light and air over the premises hereinafter described above the level of the grass plot on the northerly side of the tower of the Old South Meeting House and the right to project over not exceeding five feet of said premises" with cornices and other things. A stipulated rental was reserved to be paid "without any reduction on account of any future taking of part of the above mentioned premises by the city of Boston or other public authority for any purpose, . . . but if the whole of the premises over which the said easements are hereby extended, or the major part thereof, is taken by the city of Boston or other public authority, or if the substantial enjoyment of the easements hereby created be impaired either by any structure placed on any portion of said premises taken by the city or other public authority pursuant to and in connection with such taking or otherwise," then there should be a reasonable reduction in the rent. The premises were described by metes and bounds and distances as in ordinary conveyances.

Thereafter a taking was made by the transit commission for the city of Boston. It was not in any aspect the taking of an entire fee of the premises. Treating the earth and air above it as a solid, it was the taking of a series of prisms or prismatic sections which varied in vertical thickness between the extremes of fifty feet and twenty-four and one tenth feet. Described with reference to the surface of the earth in the open space, over which the easement extended, the highest plane of any prism was ten feet above it and the lowest not over forty feet below it. The right to suitable support for the prisms and structures which might be placed within them, by soil or otherwise, was taken

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below the lower planes of the prisms; otherwise, that below was left to the plaintiff. To the plaintiff as owner was definitely reserved the exclusive use of all areas above the upper planes of the prisms. Certain rights of support and of use for various purposes in common with the public use were preserved to the plaintiff.

The total area of land made subject to the easement of light and air in favor of the defendants' building was two thousand one hundred and fifty-six square feet. Of this, as a result of the taking, the city had exclusive surface rights in approximately four hundred and fifty-seven square feet and there remained to the plaintiff exclusive surface rights in four hundred and seventy-one square feet. Over the remaining surface of one thousand two hundred and twenty-eight square feet a right of way, as foot passages, was taken and the plaintiff retained the right of use in common with the public. It has not been argued that the form of taking is not in accordance with the statute or is unconstitutional. *Boston* v. *Talbot*, 206 Mass. 82.

It is not now contended that there has been any substantial interference with the enjoyment of the defendants' easement. The finding of the Superior Court is conclusive against such a contention. An examination of the evidences discloses no reason to disturb this finding. *Jennings* v. *Demmon*, 194 Mass. 108. The controversy is whether "the major part" of "the premises" over which the easement extends has been taken. "Premises" is a word which may have different meanings dependent upon its connection and the object to which it is applied. It oftentimes describes the fee of land. But it may signify something less extensive, if the context seems to require it.*

In order to determine the sense in which it was used in this indenture, it is important to bear in mind the subject about which the parties were contracting and their general purpose. The predecessors of the defendants as trustees were constructing a large office building with stores on the street floor in the congested part of Boston. The thing secured to them by the indenture

* *Hemming* v. *Willetts*, 7 C. B. 709, 715. *Winlock* v. *State*, 121 Ind. 531, 533. *Sands* v. *Kaukauna Water Power Co.* 115 Wis. 229, 233. *Mosley* v. *Vermont Mutual Fire Ins. Co.* 55 Vt. 142, 148. *Bowers* v. *Pomeroy*, 21 Ohio St. 184, 190. *Appeal of Hilton*, 116 Penn. St. 351. *Metropolitan Water Board* v. *Paine*, [1907] 1 K. B. 285.

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was an easement of light and air over a tract of land on one side of their building. There was in contemplation of the parties the possibility that the ownership in fee of the plaintiff in the servient estate might be lessened by some exercise of the power of eminent domain. The indenture is dated December 20, 1902, while St. 1902, c. 534, authorizing the Washington Street subway, was approved on June 27, 1902. The parties provided for the contingency of a taking under the authority of this statute. The first point settled by their contract was that there should be no reduction of rent simply if a part of the plaintiff's premises was taken, nor if any part should be conveyed or released for the widening of Washington Street and all claim for compensation by reason of any such taking, release or conveyance by the trustees against the public authorities was assigned to the plaintiff. This plainly indicates that the parties contemplated only a practical easement of light and air and that a theoretically legal, or other impairment of the easement, should work no change in their respective rights and obligations under the indenture, and that as to the public the plaintiff should represent the entire fee. The agreement then proceeds to deal with a fair adjustment between themselves of their respective rights and obligations in the event of disturbance of their contractual relations by an exercise of eminent domain. It is obvious that in touching this subject in this connection the parties contemplated a situation which would in fact make less valuable the easement, and thus equitably require a reduction of the rent reserved. They were not providing a means of revising their contract as to rent for any other reason. There is to be a reduction of rent if the substantial enjoyment of the easements is impaired by the erection of any structure or otherwise by the public authority. This protects the trustees in the event of any actual damage to them arising from the physical exercise of public rights. In that connection occurs the further stipulation (now under consideration) "if the whole of the premises over which the said easements are hereby extended, or the major part thereof, is taken." There was some claim in the trial below that this meant major part in value. But that proposition is not urged now. It is argued, however, that as the public has rights in the larger portion of the surface area of the premises, a major part of them has been taken. But the taking

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of rights in the whole of the superficial area for pedestrian travel alone cannot reasonably be held in this connection to be a taking of the major part of the premises. The taking provided against is one which would give to the public authorities a right at any time to do, upon the whole or a major part of the premises, acts which might interfere with the easement. The natural meaning of the words is an absolute taking in fee of more than half the premises as measured on the surface of the earth. But perhaps the words go further here and may include a taking even though less than of a fee which would authorize constructions over a larger part of the surface area extending high enough to interfere with the easement. But where the right taken in no case extends more than ten feet above the surface of the earth, and this only for a small area, and over the rest of the area a right of travel for people on foot is taken, it cannot be said, having reference to the circumstances attendant upon the making of the contract, that a major part of the whole premises is taken. Under other conditions and where a different thing was the subject of the contract a different result might be reached. But where parties are contracting about an easement of light and air over valuable land in the heart of a great city, which may be used profitably many feet above and below the surface of the earth, the surface area does not appear to be the measure by which to gauge the whole or major part of the premises. This construction gives a practical meaning to the agreement. Where the public acquire in the larger part of the premises rights, the exercise of which may interfere with the easement reserved, then the prospect of harm might be found to render the easement instantly less valuable, even though there was no immediate change in fact. The apprehension of the possible utilization of the right acquired might affect the character of tenants and the value of rentals. If the right was taken in less than the major part of the premises, then only an actual impairment in the substantial enjoyment of the easement would warrant a reduction of rent. Any other interpretation produces a result wide of any connection between a practical interference with the easement of light and air which was the subject about which the parties were making their agreement, and a demand for reduction in the annual rental.

There is not much weight in the argument that the instru-

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ment of taking was in effect a taking of the entire premises and that the rights remaining in the plaintiff were granted to it as new rights. The ultimate result accomplished by the exercise of the single act of eminent domain is the substance of the matter.

Decree affirmed with costs.

FORSTER MANUFACTURING COMPANY *vs.* CUTTER-TOWER COMPANY.

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Suffolk. December 7, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Unfair Competition. Equity Jurisdiction, To restrain unfair competition, Damages.

A manufacturer of toothpicks, who has established a valuable business and has adopted a box or package of distinctive size and shape bearing a characteristic design in colors, may maintain a bill in equity to restrain a wholesale dealer in toothpicks from selling toothpicks, not manufactured by the plaintiff, in boxes or packages made in exact imitation of those of the plaintiff, with the exception of the plaintiff's monogram, for the purpose of obtaining the trade of a jobber whom the plaintiff had been supplying. In such a suit it is immaterial that the immediate purchaser from the defendant was not deceived as to the identity of the goods, and the plaintiff need not show that specific buyers from such purchaser were deceived or that the defendant intended to deceive the public, he being bound to know the probable consequences of supplying the means of deception.

In a suit in equity by a manufacturer to restrain the defendant from selling goods in packages of distinctive design like those which the plaintiff had established the exclusive right to use in his business, where it is shown that the defendant wrongfully caused his packages to be made in deliberate imitation of those of the plaintiff for the purpose of acquiring as far as possible the plaintiff's customers and trade, the defendant may be liable not only for the damage suffered by the plaintiff but also to account to the plaintiff for any profits which may have accrued to the defendant from his use of the imitation packages.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 20, 1910, to restrain the defendant from selling, offering or advertising for sale any toothpicks, not manufactured by the plaintiff, in packages like those of the plaintiff or in any packages so similar as to be likely to cause the defendant's goods to be mistaken for the plaintiff's goods, and to recover damages and the

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profits which had accrued to the defendant from its alleged unlawful acts.

The case was referred to Edward S. Goulston, Esquire, as master. The facts found by the master are stated or referred to in the opinion. The master's findings as to the acts of the defendant were as follows:

"8. The defendant markets its toothpicks under a great many brand names and in many different forms of package and trade dress, and has probably the largest toothpick business in the United States; prior to the sale to the William Edwards Company hereinafter referred to, the defendant was acquainted with the plaintiff's package and was not marketing any package with a design bearing any resemblance to the design on the plaintiff's package, nor does there appear to have been any reason for the defendant to have marketed any package with a design resembling that of the plaintiff except to secure the business of the William Edwards Company as hereinafter set out.

"9. In February, 1909, that is, about a year and a half after the plaintiff had first sold to the William Edwards Company a brand of toothpicks under the name of the 'Edwards Toothpick' and packed in the plaintiff's jobbers' brand package, a salesman of the defendant called on the William Edwards Company and solicited its business. Prior to this the defendant had been selling the William Edwards Company the defendant's Ideal Brand of toothpicks in packages wholly different from the plaintiff's. The William Edwards Company told the defendant's salesman that it was having the Edwards toothpick made, and the defendant's salesman requested the right to figure and afterwards obtained an order from the William Edwards Company for the Edwards toothpick, agreeing to duplicate the package. The defendant thereafter made for the William Edwards Company the Edwards toothpick, making substantially an exact copy of the plaintiff's package with the exception of the omission of the plaintiff's monogram on the side of the package; the box maker who made the defendant's boxes for said Edwards toothpick was furnished by the defendant with one of the plaintiff's packages with directions to duplicate the same, omitting the plaintiff's monogram, and practically did duplicate the same except as to the monogram. At the time the defendant took said order from and

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ordered the boxes for the William Edwards Company it was familiar with the plaintiff's package, and knew that the monogram on the plaintiff's package indicated the plaintiff was the manufacturer, and the defendant would not have obtained the order from the William Edwards Company except for its offer to furnish the same package under a lower price. . . .

"10. After the sale to the William Edwards Company the defendant sold to a number of other dealers toothpicks in packages bearing the design complained of, but with the exception of the Edwards brand all the defendant's goods sold in said packages were marketed with brand names which were different from any brand names used by the plaintiff. In three instances of sales by the defendant of toothpicks in boxes bearing the design complained of . . . the customer had previously carried in stock and sold the plaintiff's toothpicks packed in either its factory or jobbers' package.

"11. No notice was given to the defendant by the plaintiff of its claim to the exclusive use of the package and trade dress before the bringing of the bill of complaint; after suit was brought the defendant filled orders which it had theretofore taken for toothpicks packed in the packages complained of, but has since taken no new orders for goods packed in similar packages.

"12. The plaintiff offered no evidence of actual deception, or any evidence of public recognition or reputation of its package except the presumption of such public recognition and reputation as may arise from the plaintiff's extensive marketing of its product in such package. The defendant's customers knew that they were getting the defendant's goods and not the plaintiff's goods. There is no evidence of the defendant's passing off its goods as and for the goods of the plaintiff."

The case came on to be heard before *Morton*, J., who reserved it upon the pleadings and the master's report for determination by the full court. If this court should determine that the plaintiff was entitled to the relief prayed for, the case was to stand for further hearing upon the question of damages and profits; otherwise, such decree was to be entered as to the court should seem meet.

R. Cushman, (*C. D. Woodberry* with him,) for the plaintiff.

W. A. MacLeod, (*W. A. Copeland* with him,) for the defendant.

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BRALEY, J. The plaintiff corporation, as found by the master, began the manufacture and sale of toothpicks five years and more before the bill was filed, and during this period has established a valuable business. It adopted in the marketing of the product a box or package of distinctive size and shape bearing in colors a characteristic design so collocated as to make the combination dissimilar from any label, form of package, or dress of goods then in use by other manufacturers or dealers. During the development of its trade a certain proportion of the packages had the imprint of the name of various jobbers to whom the exclusive sale of the goods had been given, or of some fanciful word or phrase suggested by them, and the entire production became classified as either the factory brand sold generally to the jobbing trade under brand names used only by the plaintiff, or the jobber's brand. But while the color of the printing and of the background on the factory brand differed from the jobber's brand, the quality of the goods was uniform, and every package as it left the factory bore the monogram of the plaintiff, with the further distinguishing design of a wreath overlapped by a curved band with an escalloped gold edge. The plaintiff upon these findings, while claiming no rights of property in the brand name used by the jobber, had acquired a reputation and good will in connection with, and as a part of its business, which generally is recognized as a property right, and will be protected against the unfair competition of rival manufacturers or dealers in similar products. *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, 349. *Reading Stove Works* v. *S. M. Howes Co.* 201 Mass. 437, 438. *Draper* v. *Skerrett*, 116 Fed. Rep. 206.

It is wholly immaterial, where this right has been invaded, that the retail or wholesale dealer who may be the immediate purchaser of goods put out in imitation is not misled as to their identity. The wrong of unfair competition is present where goods are so dressed in form, or marked by decorative symbols, that the ultimate consumer when the goods are distributed for use in the ordinary course of trade, either is, or possibly may be, deceived. The liability to deception being the test, it also is not necessary to show that specific buyers have been actually deceived or that the infringer intended to deceive the public. He is bound to know the probable consequences, where the means

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of such deception have been supplied by him. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.* 168 Mass. 154. *Reading Stove Works* v. *S. M. Howes Co.* 201 Mass. 437, 440, 441, and cases there cited.

The defendant, for the purpose of acquiring the extensive trade of a jobber with whom the plaintiff did business, deliberately duplicated the plaintiff's box or package in every particular with the exception of the monogram, and thereafter these receptacles filled with toothpicks in which the defendant although not a manufacturer very largely dealt, were widely distributed to consumers through dealers in the trade to whom it sold them. This misappropriation having been an invasion of the plaintiff's exclusive right to the form, style and dress of the box or package in which its goods had been marketed, it is entitled to injunctive relief even if the defendant had acted innocently. But as the defendant must be presumed to have contemplated the probable effect of its purpose to acquire so far as possible the plaintiff's customers and trade, it is liable for both actual damages, and profits, if any, realized from the sale of toothpicks in the imitation packages. *Regis* v. *Jaynes*, 191 Mass. 245. *Reading Stove Works* v. *S. M. Howes Co.* 201 Mass. 437, 441–443. By the terms of the reservation of the single justice, the case is to stand for further hearing upon these questions.

Decree accordingly.

GEORGE B. WHEATON, trustee, *vs.* GEORGE C. BATCHELLER & others.

Suffolk. December 7, 8, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Devise and Legacy. Equity Jurisdiction, Bill for instructions.

A testator by his will established a trust, of which the income was to be paid to his wife during her life, and provided that after her decease the principal still should be held in trust "to pay over and divide equally the net income thereof to and among my children," naming his four children, "for and during their lives respectively. And in case either of my said children shall have deceased leaving no issue living at the time of the decease of my said wife, then I direct

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that said net income shall be divided equally among my then surviving children. And in case either of my said children shall have deceased, leaving issue living at the decease of my said wife, or in case and whenever either of my said children shall decease after the death of my said wife leaving issue living at the time of his or her decease then I direct" the trustee "to divide and pay over to such issue of such deceased child that portion of the principal of said trust property to the income of which such deceased child would if living at the time be entitled, such issue to take by right of representation." Two of the testator's children died before the death of the testator's widow. One of them left no issue and on the death of the widow one third of the principal was distributed to the issue of the other deceased child. After the death of the widow the income of the remaining two thirds of the property was paid in equal parts to the two surviving children until one of them died, leaving no issue. The last surviving child had issue living. On a bill for instructions, it was *held*, that the last surviving child was to receive the whole of the income from the existing trust during her life, and that as to the distribution to be made upon her death the court would not instruct the trustee, he being entitled to instructions only as to his present duties.

BILL IN EQUITY, filed in the Probate Court for the County of Suffolk on January 31, 1911, by the trustee under the will of Gilbert Cummings, late of Boston, for instructions as to the construction of the fourth clause of that will, which is quoted in the opinion, and the duties of the trustee in making a distribution thereunder.

In the Probate Court *George*, J., made a decree that the whole of the income of the trust fund in question should be paid to the defendant Jane Maria Wheaton during her life as the only surviving child of the testator. The defendants Albert E. Cummings, Gilbert H. Cummings and Walter Cummings, children of Albert Cummings, a deceased son of the testator, appealed.

The appeal came on to be heard before *Morton*, J., who at the request of the parties reserved it upon the bill and answers for determination by the full court.

J. F. Burke, for the plaintiff, stated the case.

J. B. Lord, for the children of Albert Cummings.

W. H. Brown, for Jane M. Wheaton.

BRALEY, J. By the third clause of his will, the testator created a trust for the benefit of his wife, and then under the fourth clause provided, that after her decease the principal still should be held in trust "to pay over and divide equally the net income thereof to and among my children," who are specifically named, "for and during their lives respectively. And in case either of my said children shall have deceased leaving no issue living at the

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time of the decease of my said wife, then I direct that said net income shall be divided equally among my then surviving children. And in case either of my said children shall have deceased, leaving issue living at the decease of my said wife, or in case and whenever either of my said children shall decease after the death of my said wife leaving issue living at the time of his or her decease" then the trustee is directed "to divide and pay over to such issue of such deceased child that portion of the principal of said trust property to the income of which such deceased child would if living at the time be entitled, such issue to take by right of representation." Of the four children, Albert and Gilbert, the sons, were dead when the widow died, and Gilbert having left no issue, one third of the principal was then distributed to the children of Albert; while the income of the remaining two thirds has been paid in equal parts to the daughters until the death of Sarah without issue. The surviving daughter is Jane, who has issue living. It is the contention of the appellants, who are the children of Albert, that upon the death of Jane, one half of the remaining principal should be distributed among the heirs at law of the testator as intestate estate. The time for a distribution of the principal, however, has not yet come, and the only question which the trustee is entitled to have answered is, whether the principal shall be kept intact and the income paid to Jane as the last survivor during the remainder of her life. *Peabody* v. *Tyszkiewicz*, 191 Mass. 317, 322. The testator's intention, that after his wife's death the income should be divided equally among his children "for and during their lives respectively," is free from all ambiguity. It is not changed by the succeeding sentences of the fourth article, except as the amount might be lessened by a partial distribution of the principal upon the death of a child, "leaving issue living at the decease of my said wife." The children surviving the wife took the income as a class, and if thereafter Sarah had died leaving issue Jane would have received only the income of the remaining third. But as this contingency did not arise, she takes during life the income of the entire principal now held by the trustee. *Jackson* v. *Roberts*, 14 Gray, 546, 551. *Loring* v. *Coolidge*, 99 Mass. 191. *Dow* v. *Doyle*, 103 Mass. 489. *Fiske* v. *Eddy*, 147 Mass. 151.

Decree of the Probate Court affirmed.

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MALDEN & MELROSE GAS LIGHT COMPANY *vs.* FRANK E. CHANDLER.

SAME *vs.* SAME.

Middlesex. December 8, 11, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Appeal.

On an appeal by the defendant in a suit in equity from a final decree for the plaintiff entered after a rescript had been issued by this court overruling the defendant's exceptions to the rulings of the trial judge, this court, after reading a voluminous report of all the evidence, *held* that the evidence warranted findings of fact which supported the decree, and *said* that the finding for the plaintiff appeared on all the evidence to be the only satisfactory conclusion which could be reached.

TWO BILLS IN EQUITY, filed in the Superior Court on December 3, 1906, and January 21, 1907, by a corporation against its former president, for an accounting as to money alleged to belong to the plaintiff and to have been received by the defendant as the plaintiff's agent and to have been retained by him for his own use and benefit, the defendant having procured the money from the plaintiff for the purchase of certain land for the plaintiff.

The cases were heard together by *Dana,* J., who in both cases found for the plaintiff with costs. The defendant alleged exceptions to the rulings of the judge, which were overruled by this court in a decision reported in 209 Mass. 354. After the issuing of the rescripts final decrees were entered for the plaintiff, from which the defendant appealed, all of the evidence being reported by a commissioner appointed under Equity Rule 35.

T. W. Proctor, (*S. R. Wrightington* with him,) for the defendant.

W. O. Underwood, for the plaintiff.

BRALEY, J. It was adjudicated, when these cases were first before us on the defendant's exceptions with a report of all of the material evidence, that the judge was warranted in finding that the defendant had intentionally defrauded the plaintiff of the amounts charged in the bills of complaint. *Malden & Melrose*

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Gas Light Co. v. *Chandler*, 209 Mass. 354. *Mason* v. *Pomeroy*, 154 Mass. 481. *Boyd* v. *Taylor*, 207 Mass. 335. *McManus* v. *Thing*, 208 Mass. 55, 60. The exceptions having been overruled and final decrees entered in conformity with our decision, the defendant appealed to this court, where he contends that the decrees should be reversed and the bills severally dismissed. If under our practice a defeated party may prosecute questions of law by a bill of exceptions in suits in equity as well as in actions at law, it would seem that when on exceptions the merits of the litigation are fully presented and decided, the additional remedy of an appeal after rescript ordinarily would not be invoked. *Kennedy* v. *Welch*, 196 Mass. 592, 594.

But if the appeal in the case at bar "practically seeks to obtain a reconsideration of the former decision, or at least to avoid its effect," as was said by Holmes, J., in *Mason* v. *Pomeroy*, 154 Mass. 481, 482, the defendant nevertheless is entitled to a review of the evidence by us on the questions of fact. The review of course is subject to the familiar rule that unless clearly erroneous the findings made on the evidence by the trial judge will not be reversed. Where the credibility of witnesses and their interest in the result is largely involved, this rule, while not absolutely controlling, should be given its full effect. The personality of the witness, his manner while giving evidence, the sincerity of the narrative as manifested by the oral expression, cannot be reproduced by the printed record. *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 459.

We have carefully read the voluminous report of the evidence, which was taken by a commissioner, and find no essential difference as to the issue of liability when the evidence presented by the appeal is compared with the evidence contained in the exceptions. The defendant was called by the plaintiff and apparently cross-examined under the provisions of R. L. c. 175, § 22, and his entire evidence covers two hundred and seventy-six of the eight hundred and twelve pages of the oral testimony. It is impossible, even on his own statements of the negotiations for the purchase and transfer of the two parcels of land, not to entertain grave doubts as to the reliability of his evidence. If it was necessary from the defendant's point of view that one Stetson should first take the title to one of the parcels, no reason-

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able explanation is shown why Stetson should have conveyed the land to one Gaffey, who conveyed to the company and whom the defendant had employed as an intermediary to take title in many business transactions; or why Gaffey, instead of the company, should first have taken title to the other parcel. When Stetson had acquired title and the owners were ready to transfer the second parcel, he and they could have conveyed directly to the company, for aught that appears, without the purchase price being disclosed by the deeds. But instead the other course was deliberately taken, and the checks, which the defendant obtained from the company's treasurer, were made payable by the defendant's order to Gaffey, who indorsed them as the defendant directed, and the account was carried on the company's books in Gaffey's name. The defendant then took the proceeds of the checks and as he claimed used the money in payment for the land. A clear, connected, consistent statement of the defendant's full negotiations and payments for the lands described in the first bill of complaint cannot be obtained from his evidence. He apparently bought for $1,000 an acre, and then by some private arrangement between himself and James E. Wellington the price was changed and advanced to $2,000 an acre, and although upon the first arrangement a binding, written contract had been carefully prepared, no contract in writing was made of what the witness admitted "was a different and private trade." The defendant, as we said in our former decision, acted as the company's agent. He was bound to buy on the best possible terms for his principal, and neither directly nor indirectly could he gain any pecuniary advantage for himself. *Malden & Melrose Gas Light Co.* v. *Chandler*, 209 Mass. 354. But without rehearsing it, when the testimony of the plaintiff's witnesses, among whom were the vendors and Gaffey and Stetson, is reviewed, and which we find was not in material particulars controlled by the witnesses for the defense, the defendant's account of the transactions is seriously impeached.

As the case was left at the close of the evidence, it then devolved upon the trial judge to decide, on conflicting testimony, where the truth lay and to determine whether the defendant's account of what he had done, even when viewed in the most favorable aspect, should be accepted and implicitly followed. The

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result is shown by the decrees which he ordered entered, and, the evidence having warranted findings that the defendant by the methods which he adopted obtained from the plaintiff double the amount he paid for each parcel and appropriated the excess for his own use, the decrees not only are supported by the testimony introduced by the plaintiff, but appear upon all the evidence to be the only satisfactory conclusion which, under an impartial consideration of the record, could be reached.

It follows that in each case the decree must be affirmed with costs.

Ordered accordingly.

AMERICAN STAY COMPANY *vs.* JOHN S. DELANEY.

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Suffolk. December 11, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Agency, Agent's duty to principal: as to disclosure or use of principal's secrets, exclusive employment. *Equity Jurisdiction*, To enjoin use of business secrets, Damages. *Damages*, In a suit in equity.

An employee of a manufacturing corporation, who, because he was of unusual mechanical skill, was called upon for and gave valuable aid to the president of the corporation in the development of inventions which became the property of the corporation but never were patented although they were kept secret by the corporation and therefore were of great value to it, unless he also was employed to originate inventions for the corporation's benefit, cannot be enjoined from using new machines differing from his employer's in that they are of greater capacity and efficiency owing to inventions made by him during the period of his employment.

In a suit in equity, brought by a manufacturing corporation to enjoin a former employee from disclosing and using knowledge of secret inventions and processes of the plaintiff which it was alleged the defendant had acquired while engaged in confidential employment by the plaintiff, and to compel the defendant to account to the plaintiff because during part of his period of employment, while drawing full salary from the plaintiff, he had used a part of his working hours in the construction and equipment of a rival manufactory of his own, the injunction prayed for was denied because it appeared that at the time the suit was brought the defendant was violating no right of the plaintiff, and the prayer for an accounting was not granted because the relation of the plaintiff toward the defendant was not fiduciary and the defendant could not be compelled to account in equity for wages or salary paid to him under a mistaken

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belief that his services were bestowed upon the plaintiff without interruption; but the suit was retained for the assessment of such damages as the plaintiff suffered by reason of the defendant's breach of contract in failing to devote the whole of his working hours to the duties of his employment.

BILL IN EQUITY, filed in the Superior Court on June 14, 1910, and afterwards amended, in which the plaintiff, a corporation engaged extensively in the business of manufacturing and selling leather welting used in the manufacture of shoes, and a successor of the Union Welting Company, sought to enjoin the defendant, who since 1897 continuously had been in the employ of the plaintiff and its predecessor, from disclosing or making use of trade secrets alleged to belong to the plaintiff, the plaintiff averring that the defendant had obtained knowledge thereof in the course and by reason of his confidential employment. There also was a prayer for an accounting from the defendant and a return of the whole or a part of the salary paid to him in the last year and a half of his employment, the plaintiff averring that during that period, while drawing full pay from the plaintiff, the defendant was giving a large part of his time, energy and attention to the construction and equipment of a rival manufactory of his own without the plaintiff's knowledge or consent.

The case was referred to James D. Colt, Esquire, as master. Upon the filing of the master's report, the plaintiff moved that it be recommitted to the master for him to incorporate in the report further specified findings of fact. The motion was denied and the plaintiff appealed.

An interlocutory decree confirming the report, and a final decree dismissing the bill then were entered by order of *Hardy*, J., and the plaintiff appealed.

The facts are stated in the opinion.

J. N. Clark, for the plaintiff.

A. B. White, for the defendant.

BRALEY, J. The motion to recommit having been addressed to the judicial discretion of the trial court, and no exceptions having been taken, the plaintiff's appeal from the interlocutory decrees denying the motion and confirming the master's report present no questions for our decision. *Bakshian* v. *Hassanoff*, 186 Mass. 255. *Crosier* v. *Kellogg*, 210 Mass. 181. *Lipsky* v. *Heller*, 199 Mass. 310. The bill, however, having been dismissed,

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the plaintiff's appeal from the final decree brings up for determination the question, whether upon the master's findings equitable relief should be granted.

During the period covered by the controversy, the plaintiff was engaged in the manufacture and sale of shoe and leather trimmings, which among other products included leather welting. It is alleged, and the master reports, that by means of special machinery, secret processes and formulas largely invented, devised and discovered by its president, who is a successful inventor of much experience, the company has been enabled to make with great economy as to cost of production, and to put upon the market a leather welting of such superior quality, that it has gained a wide reputation, and an extensive and profitable trade has been fostered and established. The machines with one exception have not been patented, and if the process becomes generally known other manufacturers probably will adopt it, and this branch of the plaintiff's business may be greatly impaired in value, or wholly destroyed.

It is elementary, that if the proprietor in connection with his business invents, or discovers, and keeps secret, processes of manufacture, which enable him to produce goods at a less cost, or of more meritorious quality than his competitors, his right to the invention or discovery is not exclusive as against the public or persons whose knowledge of it has been lawfully obtained. It is a monopoly only while he retains control, and can prevent publication. *Chadwick* v. *Covell*, 151 Mass. 190, 191. *Gayler* v. *Wilder*, 10 How. 477, 493. But if in violation of his contract of employment, where although not expressly stipulated, he impliedly agreed not to divulge the plaintiff's arts and unpatented inventions, the defendant either individually, or jointly with others to whom they were improperly disclosed, undertook in the production of welt to use and apply them, a court of equity, while enjoining the continuance of such interference and further disclosure, will give relief by the assessment of damages for any injury already inflicted. *Peabody* v. *Norfolk*, 98 Mass. 452. *Coddington* v. *Bispham*, 9 Stew. 574. *O. & W. Thum Co.* v. *Tloczynski*, 114 Mich. 149. *Pollard* v. *Photographic Co.* 40 Ch. D. 345, 354. *Field* v. *Ashley*, 79 Mich. 231. *Williamson* v. *Torkington*, 2 Y. & C. Ex. 726. *Tipping* v. *Clarke*, 2 Hare, 383.

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The defendant, being of unusual ability, developed great mechanical skill while in the plaintiff's service, and with the understanding that the plaintiff believing its undisclosed methods to have been very successful desired him not to impart any information of their existence, gave valuable aid to the president in the development of his inventions, which became the property of the company. He was not, however, employed to originate inventions for the plaintiff's benefit, and while he could not appropriate his employer's trade secrets in whatever form they may have consisted, no obligation rested upon him to forego the exercise of his inventive powers, even if they were incited because of knowledge necessarily derived from the performance of his contractual duties. It was legitimate for him under these conditions to invent and perfect improvements which were embodied in new machines of greater capacity and efficiency. *Hopedale Machine Co.* v. *Entwistle*, 133 Mass. 443. *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182. *Dice* v. *Joliet Manuf. Co.* 11 Ill. App. 109, 114. *Joliet Manuf. Co.* v. *Dice*, 105 Ill. 649. *Westervelt* v. *National Paper & Supply Co.* 154 Ind. 673. *Agawam Co.* v. *Jordan*, 7 Wall. 583. *Solomons* v. *United States*, 137 U. S. 342. *Gill* v. *United States*, 160 U. S. 426.

The plaintiff's inability to support any claim to inventions which were the defendant's individual property being manifest, the master states, that it seeks to enjoin him "from making welt by substantially its process or the use of substantially its machines" as specified and described in the eighth paragraph of the bill as amended. It was a question of fact with the burden of proof resting on the plaintiff, whether these material allegations had been sustained. The master, who took a view and carefully inspected the plaintiff's factory and equipment and the factory where the defendant's machinery had been installed and he proposed to make welt, and heard at great length the contentions of the parties, exonerated the defendant from having constructed or used any machines, or taken over any process or formulas in which as against him the plaintiff had an exclusive proprietary right. A rehearsal of his elaborate comparison of their respective modes of manufacture, or of his conclusions, founded upon evidence not reported, would not diminish the effect of his report, which is an unqualified negation of the plaintiff's right to relief under the first and second prayers.

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The further findings, that the averments of the fifth paragraph as amended, charging the defendant with having in his possession drawings of the plaintiff's special machinery, with notes and memoranda of its secret formulas and processes, which he wrongly intended to use, had not been sustained upon the evidence, disposes of the third prayer, leaving the plaintiff only the fourth prayer, predicated on the tenth paragraph, as amplified by the final amendment.

It is there averred, that while receiving a large yearly salary, the defendant fraudulently devoted an appreciable portion of his time to the advancement of his own interests, by designing and constructing new and competing machinery. The bare relation of master and servant, although, as we have said, it placed the defendant under an implied obligation not to divulge or use its secrets, or duplicate and use its special machinery, did not constitute him a fiduciary, who could be compelled to account in equity for wages or salary paid under the mistaken belief that his services were uninterruptedly bestowed on the plaintiff. *Pratt* v. *Tuttle*, 136 Mass. 233. *Tateum* v. *Ross*, 150 Mass. 440. *Campbell* v. *Cook*, 193 Mass. 251, 256. But the master having found, that during the last eighteen months, while fully and satisfactorily performing his duties as superintendent, he devoted without the plaintiff's knowledge some portion of his working hours to the construction and installation of his own machinery, the bill may be retained for the assessment of whatever damages it has suffered from breach of the contract. *Wallace* v. *DeYoung*, 98 Ill. 638. *Newburyport Institution for Savings* v. *Puffer*, 201 Mass. 41, 47, and cases cited. The defendant not having taken any exceptions, or appealed from the decree of confirmation, the amount assessed by the master should be accepted as the full measure of compensation.

The interlocutory decrees must be affirmed, but the final decree should be modified by directing, that the injunction be dissolved, and the bill dismissed as to all the prayers for specific relief, and that the plaintiff recover the sum of $250, with interest from the date of filing the bill, for which execution is to issue without costs, and when so modified it is affirmed.

Ordered accordingly.

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RIDGEWAY HOLBROOK *vs.* SAMUEL F. SCHOFIELD & others.

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213 - 203
214 - 544
215 - 573
216 - 467

Suffolk. December 11, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, To reform a deed. *Equity Pleading and Practice*, Appeal, Decree.

A building, equally divided by a brick partition wall running north and south, stood in a lot of land so that the line of the partition wall was about two feet westerly of a line equally dividing the lot. The record title to that portion of the lot and building lying westerly of the line of the wall was in one who also owned the beneficial interest in the rest of the lot, the record title to which he had placed in another person for his benefit. The westerly part of the lot was sold to one person and the easterly part to another. In the deeds by mistake of the scrivener the dividing line of the two parcels was placed at the middle line of the lot instead of at the partition wall. The grantee of the westerly portion of the lot gave two mortgages, the second of which was to his grantor. In a suit in equity by the owner of the lots against the two grantees and the first mortgagee to reform the deeds, the first mortgagee and the grantee of the easterly portion of the lot were willing that the reform should be made, and a final decree was made that the deed to the grantee of the westerly portion of the lot be reformed, that the first mortgage be discharged as to the strip of land two feet wide wrongly included therein, and that the suit be dismissed as to the grantee of the easterly portion of the lot. The grantee of the westerly portion of the lot only appealed. *Held*, that the facts presented proper ground for equitable relief in the reformation of the deeds, which was decreed properly as to the grantee of the westerly portion of the lot, so that the decree was affirmed. It however *was stated* that action should have been taken as to the second mortgage similar to that as to the first and that the bill should not have been dismissed as to the other grantee, who should have been directed to file such a cross bill as would enable him to acquire a clear title to the strip in question.

BILL IN EQUITY, filed in the Superior Court on May 4, 1910, and afterwards amended, against Samuel F. Schofield, Annie L. Mason, administratrix, and Emma B. C. Holt, alleging in substance the following: The plaintiff was the owner of the entire beneficial interest in a lot of land on Annabell Street in that part of Boston called Dorchester. Upon the land was an apartment house divided through the middle by a brick partition wall running northerly and southerly, on each side of which were three apartments. The record title to the land and building lying westerly of the line of the partition wall was in the plaintiff,

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while that of the premises easterly of that line stood in one Dalton, who held it for the plaintiff's benefit and convenience. Dalton was not a party to the bill. The partition wall was two feet and five inches westerly of a line exactly dividing the lot upon which the building stood. The plaintiff negotiated for the sale of the westerly portion of the building to the defendant Schofield and the easterly portion to the defendant Holt. Deeds were executed and delivered to the respective purchasers which because of a mistake of the scrivener, instead of conveying to the defendant Schofield the westerly half of the building with the portion of the lot westerly of the line of the partition wall, and to the defendant Holt the easterly half of the building with the portion of the lot easterly of the line of the partition wall, as the parties intended, conveyed to Schofield by metes and bounds the westerly half of the lot "with the buildings thereon," and to Holt, by metes and bounds, the rest of the lot and building, the building thus being divided by a line parallel to and two feet and five inches easterly of the partition wall. The defendant Schofield gave to the defendant Mason, administratrix, a first mortgage of the premises thus conveyed, and to the plaintiff a second mortgage.

The defendants Mason and Holt were ready and willing to join in correcting the error in the deeds but, although the plaintiff had demanded of the defendant Schofield that the correction be made, he had refused to make it. The prayers were for a reformation of the deed from the plaintiff to Schofield, and of the mortgages from Schofield to Mason, administratrix, and from Schofield to the plaintiff.

The defendant Schofield demurred to the bill as amended for want of equity. The demurrer was overruled by *Hitchcock*, J.; and the defendant Schofield appealed.

The case was heard by *Pierce*, J., a commissioner having been appointed under Equity Rule 35 to take the evidence. The judge found the facts substantially as stated above, and a final decree was entered reforming the deed from the plaintiff to the defendant Schofield by making the easterly line of the premises conveyed to him the line of the partition wall, the decree stating that the title to all land easterly of such dividing line, which had been included in the deed to the defendant Schofield, "is and shall be and remain

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the same as though that deed had not been made," directing the defendant Mason, administratrix, to release from the mortgage to her from the defendant Schofield the strip of land wrongly included in the deed to him and the mortgage to her, and dismissing the bill as to the defendant Holt without costs.

The defendant Schofield appealed.

W. R. Bigelow, for the defendant Schofield.

G. C. Coit, for the plaintiff.

BRALEY, J. The property in dispute is a parcel of land on which is a wooden building divided into two dwellings, separated by a partition wall of brick extending through the premises from north to south, as shown by the plan which forms part of the record. If divided and described with the centre of the wall for a boundary, the easterly and westerly portions are of unequal area, as the easterly portion would exceed the westerly portion by a strip two and one half feet in width for the entire length of the lot. The evidence warranted the judge in finding, that in the negotiations for the sale of the estate to the defendants Schofield and Holt it was referred to respectively as the westerly and easterly half, and under this description the parties mutually understood that each defendant was buying, and the plaintiff was selling with the appurtenances, the house and land under it as defined by the wall of partition. By mistake the agreements of sale made no reference to the wall, but divided the land by courses and distances into equal parts, and this error having been perpetuated in the deeds of conveyance, the dividing line, which is the easterly limit of the lot of the defendant Schofield, who first acquired title, runs through the house of the defendant Holt. The plaintiff by the bill as amended asks for rectification of this mistake, and reformation not only of the deed to Schofield, but of the mortgage deeds given by Schofield to the defendant Mason, and to the plaintiff, in which the error is repeated. A case for equitable relief having been aptly stated, the interlocutory decree overruling the demurrer is affirmed. *Eustis Manuf. Co.* v. *Saco Brick Co.* 198 Mass. 212, 218, 219. It also is clear, that the record title to the strip described being in the plaintiff, reformation should be decreed. *Livingstone* v. *Murphy*, 187 Mass. 315.

But the plaintiff in equity holds the title for the benefit of the defendant Holt, who bought and paid for it, although because of

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the common mistake her deed fails to include all of the land purchased. It appears, that she interposed no defense, and admitted the allegations of the bill, yet where the parties interested are all before the court as in the present case, their rights will be ascertained, and if possible, complete relief as to each will be decreed. *Richards* v. *Todd*, 127 Mass. 167, 169. And upon the pleadings, as well as at the close of the evidence, it was certain that this could not be done, as affirmative relief to enforce her rights could only be given on a cross bill. *Andrews* v. *Gilman*, 122 Mass. 471. *Braman* v. *Foss*, 204 Mass. 404, 410, 411. The court, however, if the pleadings were insufficient, need not depend on the voluntary action of the parties, but could have directed that a cross bill should be filed to enable it fully to settle justly and finally the several titles. *Field* v. *Schieffelin*, 7 Johns. Ch. 250. *Stevens* v. *Stevens*, 9 C. E. Green, 574. The bill should not have been dismissed as to this defendant, but further directions should have been given in accordance with the principles we have stated. The final decree also should have directed the reformation of the second mortgage. If this mortgage should be foreclosed after the first mortgage had been reformed, the conveyance to the purchaser at the foreclosure sale would cloud the record title of the defendant Holt to the strip. *Sawyer* v. *Cook*, 188 Mass. 163, 169.

But, as the defendant Schofield alone appealed, the decree as to him must be affirmed with costs, leaving the defendant Holt to apply to the Superior Court for such further proceedings as she deems advisable for the protection of her interests. *Kane* v. *Shields*, 167 Mass. 392. *French* v. *Peters*, 177 Mass. 568. *Lakin* v. *Lawrence*, 195 Mass. 27. *Marshall Engine Co.* v. *New Marshall Engine Co.* 203 Mass. 410.

Ordered accordingly.

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BLANCHE B. WHITWELL, administratrix, *vs.* SCHUYLER S. BARTLETT & others, trustees.

212 - 560

Suffolk. December 11, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Probate Court, Decree, Appeal. *Res Judicata. Executor and Administrator. Trust. Evidence*, Presumptions and burden of proof. *Death.*

A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard from for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead" and that at the time of his death, "so far as appears from the evidence, he last dwelt" within the jurisdiction of the court, was not such an adjudication either of the fact or of the date of the death as to render inadmissible evidence, which tended to determine whether the alleged decedent died before or after a certain date, and which was offered at the hearing, where that question was material upon a petition filed by the administrator for an order directing distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed.

Upon the filing in the Probate Court of a petition under R. L. c. 147, § 20, for the liquidation of a trust fund and payment of it to the petitioner in distribution, notice was ordered and was given to the trustees of the fund and to all persons interested in the trust and in the distribution. The trustees alone appeared. After a hearing in the Probate Court the petition was granted. The trustees alone appealed. The single justice who heard the case on appeal found a certain fact from which it would follow that the time for distribution of the fund had arrived, but that the petitioner was not entitled to any of it, and reserved the case for determination by the full court. Counsel for one entitled to share in the fund filed a brief and was heard in argument before the full court asking for an order that the fund be distributed to those entitled to it under the finding of the single justice. *Held*, that the decree of the Probate Court should be reversed, and that because the parties entitled to the fund were not properly before the court asking for distribution, the petition should be dismissed unless such parties were allowed by the Probate Court to intervene.

PETITION, filed in the Probate Court for the county of Suffolk on January 20, 1911, under R. L. c. 147, § 20, by the administratrix of the estate of William Scollay Whitwell, third, seeking an order for distribution to the petitioner of a fund held by the respondents as trustees under the deed of trust described in the opinion.

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The petitioner was appointed administratrix by a decree of the Probate Court for the county of Middlesex which was dated November 16, 1910, and contained the following recital: "I find that on February 25, 1910, a presumption arose that the said William S. Whitwell Third was dead; that at that time his only heir at law and next of kin was the petitioner; that at the time of his death, so far as appears from the evidence, he last dwelt in Cambridge in this county as alleged in the petition."

Upon the filing of the petition in the Probate Court notice thereof was ordered and was given by mailing and by publication in newspapers in Boston, in New York City, in Waco, Texas, and in San Francisco, California, to "William Scollay Whitwell, Third, and his heirs, actual or apparent, to all persons interested in the distribution of" the fund, and to the trustees under the trust deed. After a hearing in that court, *Grant*, J., made a decree granting the petition.

On appeal, the case was heard in this court by *Loring*, J. As stated in the opinion, the main issues of fact were, whether William Scollay Whitwell, third, was dead, and, if so, whether he had died before or after his aunt, Mary Hubbard Whitwell, who died on January 23, 1908. If he had died before her, his brothers were entitled to the funds in question; if after, the petitioner was entitled to prevail.

There was evidence that in February, 1903, William Scollay Whitwell, third, was a senior in Harvard College. The previous winter his father had taken him out of college and he had been in Europe because be had over-exerted himself in college athletics and had become unduly nervous and subject to attacks of melancholy and depression. The next year he resumed his work in college with unusual zeal. On February 26, 1903, he disappeared from Cambridge. The next day his room mate received a letter, signed by him and postmarked the afternoon of February 26, 1903, showing great depression and stating his intention to commit suicide from on board the steamship running from Fall River to the city of New York. He never was seen or heard of again, although diligent advertising, detective bureaus and personal search were resorted to by his relatives. The single justice, "without resort to presumption," found that he had died on or about, or soon after, February 26, 1903.

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The case was reserved for determination by the full court on a report of all the evidence before the single justice, which was "to be considered upon the question of death if, and only if, that question" was "held to be open in these proceedings."

Other facts are stated in the opinion.

H. James, Jr., for the petitioner.

J. Noble, for the trustees.

F. Rackemann, for Cutler B. Whitwell.

BRALEY, J. The settlor provided by the indenture of trust that upon his decease the principal should be equally divided between his three children, William Scollay Whitwell, junior, Mary Hubbard Whitwell and Elizabeth Tudor. But the shares coming to the daughters were to be retained in trust to pay the income during life, and upon the death of either without having exercised in favor of her husband, if she married, the power of appointment which had been given, the trustees were to transfer her share to her children who attained the age of twenty-one years, or their issue if they died under that age, to be divided equally. In default of children or grandchildren, the trustees were directed to make distribution among the persons who, if she had died intestate, would have inherited the property under our statutes of descent and distribution. When the settlor died the son received his portion, while the trust continued as to the daughters, until the death of Mary, who never married. The trustees then paid one half of her share to Elizabeth; and William having predeceased Mary, leaving three children at his death, they would have inherited equally the remaining half if living at the date of their aunt's decease, January 23, 1908. But while two of them were known to be then living, his son William Scollay Whitwell, third, had disappeared, and the trustees being uncertain as to their duties petitioned the Probate Court for instructions. The decree directed them to distribute two thirds of the remainder to the next of kin thus ascertained, and to hold the residue in trust accumulating the income, and adding it to the principal for the benefit of the absent heir, or those claiming under him. The petitioner, who is his mother and sole heir at law, having been appointed administratrix of his estate on November 16, 1910, under the presumption as recited in the memorandum accompanying the decree, that he was dead on February 25, 1910, brings

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the present petition under R. L. c. 147, § 20, which reads as follows: "If, by the provisions of a written instrument, a trust estate is to be distributed in whole or in part, the Probate Court may, upon the petition of a person interested, after such notice as it may direct, order the trustee to convert the said estate, both real and personal, or either, into cash and to distribute it among such persons as, according to such instrument, are entitled thereto." The decision depends upon the question whether William Scollay Whitwell, third, survived his aunt.

By the express provisions of R. L. c. 136, § 3, the probate decree was not conclusive of the fact of death. It only adjudicated, that upon presumptive evidence satisfactory to the court, the alleged intestate was not living at the date of filing the application, and that letters of administration should be granted. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87. *Day* v. *Floyd*, 130 Mass. 488, 489.

It is unnecessary to decide whether independently of this exception, the decree, under R. L. c. 162, § 2, would be conclusive upon all questions involved in the adjudication, until vacated or revoked by appropriate proceedings instituted in that court. See *Waters* v. *Stickney*, 12 Allen, 1, 15; *Gale* v. *Nickerson*, 144 Mass. 415; *Harris* v. *Starkey*, 176 Mass. 445, 447; *Bennett* v. *Pierce*, 188 Mass. 186, 187; *Connors* v. *Cunard Steamship Co.* 204 Mass. 310. The petitioner's title was not dependent upon the decree, nor was the single justice bound by it so far as it purported to fix the date of death, and upon the inquiry presented, all the testimony admitted by him was competent. *Brigham* v. *Fayerweather*, 140 Mass. 411, 415.

We are asked to reverse his finding, that the intestate died "on or about, or soon after, February 26, 1903." The authority of the full court to reach a different result is unquestioned. But we are satisfied, that the intestate's death was proved beyond conjecture, and if the time was not precisely fixed by any one witness, the probative effect of all the evidence is sufficient to sustain the finding.

To avoid any misconception it should be said, that the finding affirmed is not based on the presumption of Whitwell's death after an unexplained absence of seven years, and there is no occasion to consider the contention of the appellants whether the St.

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of 1905, c. 326, providing for the final distribution of trust estates, which depend upon the death of a beneficiary who has disappeared, absconded, or is absent from the Commonwealth, and has not been heard from for more than fourteen years before the filing of the petition, is applicable.

If the petitioner has no inheritable interest affirmative relief cannot be ordered on the appeal in favor of the other beneficiaries, who are not parties of record, even if one of them through counsel filed a brief and was heard at the argument. They might have appeared in the Probate Court in response to the citation, and upon filing a cross petition for distribution which would have been equivalent to a cross bill, if the suit had been brought in this court or in the Superior Court, under R. L. c. 159, § 1, or c. 147, § 15, for termination of the trust, a decree could have been entered in their favor, if the petitioner failed to maintain her claim. Nor is the present case analogous to a bill or petition by a trustee for instructions where all parties interested may appear, interplead and be heard, and have their rights determined. *Heard* v. *Trull*, 175 Mass. 241. *Howe* v. *Howe*, 184 Mass. 34, 38, 39. *Holbrook* v. *Schofield*, *ante*, 234.

The decree of the Probate Court, that the remainder should be transferred to the petitioner must be reversed, and the petition dismissed, unless the surviving beneficiaries, if they so desire, are permitted by that court to intervene. If they become parties, a decree is to be entered terminating the trust, and directing the trustees, who are not entitled to any security by way of indemnity, to pay to them the fund with all accumulations. *Pierce* v. *Prescott*, 128 Mass. 140, 142, 143. *Cleaveland* v. *Draper*, 194 Mass. 118, 122.

Decree accordingly.

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JOHN F. CASEY *vs.* JOHN W. MAY.

Suffolk. December 12, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Amendment of bill, Recommittal of master's report.

In a suit in equity for an accounting by the defendant as to the profits of an enterprise which the plaintiff alleged had been created by the joint efforts of himself and the defendant under an agreement whereby the profits should be shared, where a master finds that the enterprise was the result of the joint efforts of the parties but that there was no agreement for a sharing of profits, that the plaintiff's services were rendered at the request of the defendant and with the understanding that the defendant would pay for them if the enterprise was a financial success, and that it was a financial success, the plaintiff may recover a fair compensation for his services under the prayer in the bill for general relief.

After the allowance of an amendment to a bill in equity adding allegations which were unnecessary to give the plaintiff relief, it is within the discretionary power of the court to recommit the case to a master although the issues added by the amendment already have been heard by him and findings made thereon.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 30, 1908, in which the plaintiff alleged in substance that in December, 1897, it was agreed between the plaintiff and the defendant that they should use their joint efforts to devise some method or system whereby the work of operatives in the cutting rooms or cutting departments of factories where boots, shoes, and similar articles were manufactured might be accurately checked and the amount of leather required for cutting pieces for various sizes of shoes might be accurately determined; that all disbursements necessary in devising, developing, and introducing any such method or system should be borne by the defendant solely, and that the proceeds which might be received from any such method or system that might be devised or discovered by the plaintiff and the defendant should be applied first to the expenses of devising, developing, and introducing the method or system and for the payment to the defendant of a fair but moderate salary, and that the proceeds above such expenses and salary should be divided equally between the plaintiff and the defendant; that through

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their joint efforts a tabular scheme was devised and was copyrighted in the name of the defendant, and had been extensively introduced by the defendant and had resulted in large financial returns; that no accounting ever had been made to the plaintiff and no share of profits had been paid to him. The prayers of the bill in substance were for the establishment of a right of the plaintiff to a one half share of the net profits, and for an accounting by the defendant and the payment to the plaintiff of his share of the profits. There also was a prayer for general relief.

The case was referred to Franklin T. Hammond, Esquire, as master. In his report he found in substance that the scheme above described was devised by the plaintiff and the defendant jointly and had been used by the defendant with large financial profit. He further found as follows: "In regard to the contract which the plaintiff claims was made between the parties, I am not satisfied by the evidence that such a contract was intended to be made. On the other hand, there is no doubt that largely, if not wholly, owing to the plaintiff's efforts a table of relative areas was prepared which has been copyrighted by the defendant and has been and now is of considerable value to him in connection with his system. I find that this table was prepared by the plaintiff in consequence of the defendant's requests, and from the evidence I find that it was the understanding between the parties that if the system was a financial success the plaintiff should be entitled to be paid for his services. I find that the system has been a success and that the plaintiff has become entitled to a reasonable amount as pay for the work done by him during the fall and winter of 1897. Considering the time spent by the plaintiff, the work done, and the usefulness of the table of percentages, and all the other matters bearing on this question, I find that $1,500 would be a fair compensation for the plaintiff's services."

The report was filed on March 25, 1910, and the defendant filed exceptions thereto. On June 28, 1910, the defendant's exceptions were overruled by *Rugg*, J., and the plaintiff was allowed to amend his bill by adding a paragraph alleging that the table referred to was prepared by him at the request of the defendant and in accordance with an understanding that, if the system

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was a success, he should receive a reasonable compensation for his services. On the same day the suit was recommitted to the master by a decree which, as subsequently amended on October 21, 1910, directed him "to hear the parties and their evidence upon the issues raised by the motion to amend the bill of complaint . . . to find the facts and report the same to the court upon the material evidence already introduced, and such further evidence as either party may introduce, each party to have the right to make such objections to, and to ask for such rulings upon, any portion or portions of the evidence already introduced as he would have had, had such evidence not previously been offered, and also to report such portion of the evidence as either party may request."

In his supplemental report the master reaffirmed his former findings. Exceptions by the defendant to the supplemental report were overruled and the report was confirmed and a final decree was made by *Loring*, J., directing the defendant to pay to the plaintiff $1,500 and interest. The defendant appealed.

J. C. Burke, for the defendant.

J. B. Studley, for the plaintiff.

BRALEY, J. The plaintiff, who took no exceptions to the report, failed to satisfy the master, that he was entitled to a proprietary interest in the system devised by the joint efforts of the parties for easily computing the quantity of leather required for different sizes of shoes, whereby the usual waste in cutting hides under methods then in use would be largely diminished or wholly eliminated, and to an accounting for the proceeds received by the defendant, through whose exertions it had been adopted and used by a large number of manufacturers. But if the failure to prove these essential averments disposes of the prayers for specific relief, yet the master having found further, that the plaintiff's services and mathematical skill contributed appreciably to the development and perfection of the system, the compensation awarded could have been decreed under the original bill, and the amendment filed and allowed after the coming in of the report was unnecessary. *American Stay Co.* v. *Delaney*, *ante*, 229. It was, however, within the discretion of the single justice not only to order a recommittal, but to direct that the hearing should be had upon the material evidence already introduced, and such

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further evidence as either party might offer upon the issue raised by the amendment, even if the question had already been decided. The granting to each party of the further right "to ask for such rulings upon, any portion or portions of the evidence already introduced as he would have had, had such evidence not previously been offered," and "to report such portion of the evidence as either party may request," also was discretionary, and the interlocutory decree of recommittal as amended is affirmed. *Crosier* v. *Kellogg*, 210 Mass. 181.

The defendant's third exception to the original, and the third and fourth exceptions to the supplemental report being untenable, the exceptions which are common to both reports, that no implied contract had been proved, and that the amount awarded to the plaintiff was unreasonable, remain for decision. If the entire report is read with the evidence so far as reported, it amply sustains the master. The plaintiff at the request of the defendant having rendered valuable services, which were not intended to be gratuitous, was rightly allowed compensation, and the amount not appearing to be excessive, the final decree must be affirmed with costs. *Dickey* v. *Putnam Free School*, 197 Mass. 468, 473.

Ordered accordingly.

LOUISE KING *vs.* EUGENE A. STOWELL, trustee, & another.

214 - 108
214 - 113
214 - 373

Middlesex. December 13, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, To reach income of trust fund for debt due from trust estate. *Equity Pleading and Practice*, Parties. *Conservator.*

Where under the terms of a will a trustee is directed to set aside a sum sufficient to yield an income of not less than a certain sum annually to be applied for the support and maintenance in a suitable home of a feeble-minded daughter of the testator, and the trustee employs a woman to care for the daughter and also borrows from such caretaker a sum of money for which he gives a note of "the estate of" the testator signed by himself as trustee, and then resigns without ever filing an inventory or account and while the estate still owes the caretaker the amount so borrowed and for her services for over two years, the

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caretaker, upon the appointment of a new trustee, can maintain a suit in equity against the new trustee to have her claim established, to have it ascertained whether there are funds in the hands of the trustee as accumulated and unexpended income which can be applied to the payment of her claim, and to have orders made for such payment in accordance with the facts as found to exist.

The conservator of a feeble-minded person is not a proper party defendant in a suit in equity against a trustee of a fund for the benefit of such person in which the plaintiff sought to have a claim for services as caretaker of the feeble-minded person paid from the income of the trust; but the feeble-minded person should be made a party defendant and, on application by the conservator, he then may be appointed guardian *ad litem*.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 20, 1911, against Eugene A. Stowell, trustee under the will of Charles A. Ranlett, late of Billerica, and Charles R. Darling, conservator of the property of E. Minnie Ranlett. The facts alleged in the bill were in substance as follows:

Charles A. Ranlett died in 1878 leaving a will containing the following paragraph: "After the death of my wife should our daughter E. Minnie Ranlett survive her, my said trustees are hereby directed and required to set aside and invest and themselves to hold in trust so much of my property either real or personal or both as may be sufficient to produce an annual income of not less than six hundred dollars which income shall be from time to time applied to the support and maintenance of my said daughter E. Minnie Ranlett during her life. She to be provided with such suitable home as my said trustees or any two of them may elect." Other provisions of the will are stated in the opinion.

The testator was survived by his wife, three sons and the daughter, E. Minnie Ranlett, who was not and never had been "of sufficiently sound mind to manage her property or interests." The widow died in 1892. The sons and the survivor of them were the trustees under the will until June, 1909, when the sole surviving son resigned as trustee and the defendant Stowell was appointed as sole trustee. In September, 1909, E. Minnie Ranlett was committed to Danvers Insane Hospital and in November of the same year the defendant Darling was appointed conservator of her property.

The plaintiff was employed by the trustee in 1879 to take care of E. Minnie Ranlett, and did so until she was removed to Danvers. She also rendered to the trustee other services from that time to October 29, 1909. For her services she was paid until July

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8, 1907, but received no pay for her services between July 8, 1907, and October 29, 1909. On May 10, 1906, the then trustee, as trustee and for the benefit and uses of the estate, borrowed $350 from the plaintiff and gave her a note reading as follows: "Six months after date, for value received, the Estate of Charles A. Ranlett promises to pay to Louise King, or order, three hundred and fifty dollars, without interest before or after maturity. Estate of Chas. A. Ranlett, by Horace D. Ranlett, Trustee;" and "therefore," the bill averred, "the defendant trustee, in the trust represented by him, is indebted to the plaintiff for her services and for the money loaned by her as aforesaid in the sum of $1,907."

The following facts then were alleged in the fourth paragraph of the bill: The predecessors of the defendant trustee never set aside a definite fund that would yield an annual income of $600 for the support of E. Minnie Ranlett, as required by the will, and never filed any trustee's inventory or account. While there were when the bill was filed funds in the hands of the defendant trustee, it was uncertain and not ascertained what part of the property in his hands was principal and what was accumulated and unexpended income, but, it was averred, that some portion of the property then on hand certainly was such income.

The conservator had no funds in his hands. The trust estate owed no considerable money other than to the plaintiff.

There was also an allegation that the plaintiff had no sufficient remedy at law by which she could reach the trust fund and obtain the payment of her claim.

The prayers of the bill were, (1) for an accounting as to what was due to the plaintiff from the defendant trustee or the trust estate; (2) "that it be ascertained what portion of the property in the hands of the present trustee is income, and that said trustee be ordered to apply such portion in payment of the indebtedness of the trust to the plaintiff, until such indebtedness is satisfied; and if the income now in the trustee's hands does not equal such indebtedness, then that the trustee be ordered also to apply future income to such payment until said indebtedness becomes satisfied;" (3) that the defendant conservator should be restrained from demanding further income from the trust estate until the plaintiff's indebtedness was paid; and (4) for general relief.

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The defendants severally demurred to the bill for want of equity. The demurrers were sustained by *Loring*, J.; and the plaintiff appealed.

A. S. Hall, (*T. D. Luce, Jr.*, with him,) for the plaintiff.

E. E. Elder, (*C. R. Darling* with him,) for the defendants.

BRALEY, J. The testator devised his property to three trustees in trust to pay the income for life to his widow, and upon her death, if his daughter E. Minnie Ranlett survived, "my said trustees are hereby directed and required to set aside and invest and themselves to hold in trust so much of my property either real or personal or both as may be sufficient to produce an annual income of not less than six hundred dollars which income shall be from time to time applied to the support and maintenance of my said daughter E. Minnie Ranlett during her life. She to be provided with such suitable home as my said trustees or any two of them may elect." It is evident from the averments of the bill that the daughter not only survived her mother, but never has been of sufficient mental capacity to care for herself properly, or to manage her own affairs. The testator knowing of her defective mentality created the trust to provide a suitable home and comfortable support for an unfortunate child, and until the trustees after the mother's death separated the trust fund from the entire property in their possession, the general estate was charged with the payment of an annual income to the extent of $600, coupled with the power conferred in the last item of the will "to make such sale and investment of my property either real or personal as to any two of them may seem judicious and proper."

The administrative powers of the trustees are to be ascertained from the terms of the trust, viewed in the light of the testator's purpose. It was his intention, that she should be affectionately cared for, and her brothers who take the remainder were made the trustees. He did not pause with the establishment of the fund, but directs that she is to be provided with a "suitable home" the selection of which is left to the judgment of a majority of the trustees. In the necessary administration of the trust, they were empowered not merely to select a place of residence where within the limits of the income she would be provided with shelter and sufficient food and clothing, but to furnish because

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of her incapacity the services of an attendant or nurse, who also so far as possible would administer to her mental happiness. *Kendall* v. *May*, 10 Allen, 59, 67. *May* v. *May*, 109 Mass. 252. *In re Pink*, 23 Ch. D. 577.

The authority to bind the estate being clear, if the trustees to prevent a failure of the trust, had advanced money in anticipation of income to meet necessary expenses as they accrued or had contracted debts in the proper care and maintenance of the beneficiary which remained unpaid, they would have been entitled to reimbursement for the advances, and to indemnity for the amount of the outstanding indebtedness. *Hayes* v. *Hall*, 188 Mass. 510. *Ashley* v. *Winkley*, 209 Mass. 509. *Gisborn* v. *Charter Oak Life Ins. Co.* 142 U. S. 326. *Nelson* v. *Duncombe*, 9 Beav. 211, 233. *Chester* v. *Rolfe*, 4 DeG., M. & G. 798. A creditor, however, from whom they borrowed money for the purposes of the trust, or an employee to whom money was due for services rendered the beneficiary at their request could not reach the trust property at law, but must resort to a court of equity for relief. *Mason* v. *Pomeroy*, 151 Mass. 164, 167. It is only where the powers conferred by the trust have been exceeded, that the creditor's sole recourse is to the personal liability of the trustee. *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533. *Dunham* v. *Blood*, 207 Mass. 512.

But if the powers of the trustees have been defined, and the present trustee who has not assumed them, cannot be held for debts lawfully contracted by his predecessors, the defendants contend, that no liability of the trust estate is shown by the further averments of the bill. *Foote* v. *Cotting*, 195 Mass. 55. The plaintiff was employed by the original trustees shortly after the testator's death, and during a period of thirty years the daughter remained in her care at the testator's homestead which comprised part of the trust estate. It also was the home of the widow, and of one of the trustees until their death, which occurred respectively fourteen years and twenty-six years after the plaintiff began service. The selection by the trustees of the family home as the daughter's abode during the lifetime of her mother and uncle, and their employment of the plaintiff to care for her, were within the authority conferred by the will. The choice moreover having been made, and the plaintiff employed when all the trus-

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tees were living, it was not improvident management on the face of the bill for the survivors or survivor as death reduced their number, to make no change in the arrangement, which continued apparently until the appointment of the defendant Stowell as trustee. The plaintiff was not required to obtain judgment against the sole surviving trustee personally either before or after his resignation as a condition precedent to proceedings against the trust estate, even if, as to her unpaid claim for services, the fact that he acted in a fiduciary capacity would not have been a defense. *Mason* v. *Pomeroy*, 151 Mass. 164. *Lyman* v. *National Bank of the Republic*, 181 Mass. 437, 438. *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533. *Dunham* v. *Blood*, 207 Mass. 512.

But by the tenor of the promissory note given the plaintiff for money averred to have been lent to the estate, the trustee incurred no personal liability, and her only remedy is the present suit. *Shoe & Leather National Bank* v. *Dix*, 123 Mass. 148. *Hussey* v. *Arnold*, 185 Mass. 202. *Fehlinger* v. *Wood*, 134 Penn. St. 517, 523. The plaintiff, however, even if she dealt with the trustees in their representative capacity and they acted within their powers, stands on the same footing with them, when she seeks by right of equitable substitution to enforce her claims against the estate. *Mason* v. *Pomeroy*, 151 Mass. 164. *Gisborn* v. *Charter Oak Life Ins. Co.* 142 U. S. 326, 337. *In re Johnson*, 15 Ch. D. 548. If the bill is examined, it does not disclose any misappropriation of the income by the trustees, or either of them, and under the fourth paragraph the result of an accounting cannot be determined on demurrer. It may appear when the account is stated, that by reason of unfaithful administration they would have been indebted to the estate, but how far their delinquency would affect the plaintiff's right of recovery is not before us. See *In re Johnson*, 15 Ch. D. 548; *Strickland* v. *Symons*, 22 Ch. D. 666, 671; *In re Evans*, 34 Ch. D. 597; *In re Gorton*, 40 Ch. D. 536. A case for equitable relief having been stated, she is entitled to a trial on the merits. *Mason* v. *Pomeroy*, 151 Mass. 164, 168.

The conservator appointed under R. L. c. 145, § 40, to have the charge and management of the property of the beneficiary cannot administer the trust or receive and expend any part of the income, and he should not have been made a defendant.

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But as her personal interests may be affected by the proceedings she should be joined as a party, and when this has been done and process served upon her, the conservator on application to a single justice may be appointed guardian to the suit, and appear and represent his ward. *Taylor* v. *Lovering*, 171 Mass. 303. *Cunningham* v. *Davis*, 175 Mass. 213. *McKenna* v. *McArdle*, 191 Mass. 96, 100.

The decree, so far as it sustained the demurrer of the defendant Darling and dismissed the bill as to him, is affirmed, but as to the defendant Stowell, the decree is reversed, and the demurrer overruled.

Ordered accordingly.

GREENFIELD SAVINGS BANK *vs.* ROBERT ABERCROMBIE & others.

Franklin. December 13, 14, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Savings Bank, Duties and liability of members of investment committee. *Equity Pleading and Practice,* Bill. *Limitations, Statute of.*

The members of the investment committee of a savings bank in this Commonwealth are liable to the bank and its depositors for losses incurred from the making of loans largely in excess of the limit imposed by St. 1894, c. 317, § 21, cl. 1, of which they might have known "by the exercise of a reasonable degree of care and prudence."

In a bill in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of St. 1894, c. 317, §§ 21, 24, certain allegations, which were not essential to the liability of the defendants and merely set forth the circumstances in the light of which their conduct was to be judged, were held to be in no way repugnant to the ground for relief stated by the bill.

The requirements of St. 1894, c. 317, §§ 21, 24, in regard to the investment by savings banks in mortgages of real estate, to the amount there limited, that they shall be first mortgages, that "no loan on mortgage shall be made except upon the report of not less than two members of the board of investment, who shall certify to the value of the premises to be mortgaged, according to their best judgment, and such report shall be filed and preserved with the records of the corporation," and that "all applications for loans shall be made in writing, through the treasurer of the corporation, who shall keep a record thereof," are mandatory and not merely directory, and, although a loan made without the

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observance of these requirements may be valid as between the bank and the borrower or as to third parties, its making is beyond the powers of the investment committee of the bank as between them and the bank and its depositors, and constitutes a wrongful diversion of the funds of the bank, for which the members of such committee are liable.

The powers of the investment committee of a savings bank in relation to the bank and its depositors are limited not only by the provisions of the statutes but also by the terms of the by-laws of the bank.

In a suit in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of St. 1894, c. 317, §§ 21, 24, the defendants stand in the relation of trustees toward the bank and its depositors, and consequently the statute of limitations begins to run against the bank only from the time that it learned of the defendants' wrongdoing.

SHELDON, J. This bill is brought in the name of the plaintiff by the bank commissioner, who, it is averred, has taken possession of the business and property of the plaintiff under the provisions of St. 1910, c. 399, and is now administering its affairs. The defendants were five of the seventeen members of the plaintiff's board of trustees, constituted its investment committee, and two of them were respectively its president and vice-president. The bill alleges that the defendants in violation of their duties have committed many acts of misconduct specifically set out in the bill, and seeks to hold them personally liable for large losses on certain specified loans of the bank's money alleged to have been made by them on certain described parcels of real estate. It is averred that in making these loans the defendants violated the statutes then in force (St. 1894, c. 317, §§ 21, 24 *) and also the by-laws of the plaintiff; and the particulars of such violations are set out in detail. It is charged that these investments were made contrary to law and in excess of the authority of the defendants, and that they resulted in the loss to the bank of large sums of money. The details as to the making of each one of these investments and as to the subsequent dealings of the defendants therewith are stated in the bill, and the alleged wrongful acts of the defendants and the losses resulting therefrom are fully set out. According to the averments, each of these loans was largely in excess of the value of the security taken, "as the defendants well knew, or by the exercise of a reasonable degree

* Now incorporated in St. 1908, c. 590, § 68, as amended by St. 1909, c. 491, § 8.

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of care and prudence might have known;" most of them were made without any report or certificate of two members of the board of investment (St. 1894, c. 317, § 21, cl. 1); in many instances no written applications for the loans were made and recorded, as required by § 24 of the same act; and in some instances money was lent on second mortgages. It is alleged also that the rules (which are specified in the bill) adopted by the board of trustees were not complied with in the respects specified in the bill. It is alleged that these loans were made to or for one Rich and one Dowlin for the purpose of assisting them in certain real estate transactions in which the defendants had an interest. Further manipulations of some of these properties are averred to have been made by the defendants by causing deeds of them to be given and by making foreclosures followed by other deeds, resulting in the defendants taking for the bank new and larger mortgages upon the same properties which had been found to be insufficient security for the original and smaller loans.

Each of the defendants has demurred to the bill * on many different grounds. It scarcely seems necessary to discuss these separately. It will be enough to consider the objections which have been stated in the elaborate argument made for the defendants.

They contend in the first place that the members of the investment committee of a savings bank, acting in good faith, are not liable for losses resulting from errors of judgment attributable to mere negligence in making loans within the scope of their authority. They say that the averments of the bill are not sufficient to show that they acted unlawfully by taking loans to an excessive amount upon property of insufficient value. Those averments are in substance that the loans were largely in excess of the statutory limit, "as the defendants well knew, or by the exercise of a reasonable degree of care and prudence might have known." It follows of course from the recognized rules of equity pleading that such an averment in the alternative does not charge actual knowledge, but simply that the defendants by the exercise of reasonable care and prudence ought to have known the fact. This they say is not sufficient; and they rely upon a large number

* The bill, as amended, was filed in the Supreme Judicial Court on May 24, 1911, and the case was reserved by *Morton*, J., upon the demurrers to the amended bill for determination by the full court.

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of familiar decisions in which it has been held that the directors or managers of a business corporation conducted for profit are not to be made responsible for losses due to a mere error of judgment, where there has been an honest exercise of judgment. It is not necessary to refer to these cases in detail. They are almost without exception statements or illustrations of the rule laid down in *Lyman* v. *Bonney*, 118 Mass. 222, and *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480. But these and similar decisions are not applicable to the case of a savings bank under the laws of this Commonwealth. As was said in *Gilson* v. *Cambridge Savings Bank*, 180 Mass. 444, 446, we have an "elaborate statutory system for the government and regulation of savings banks, which is intended to protect the interests of depositors." As to these depositors, for the encouragement of thrift by the allowance of interest upon small savings, they approximate somewhat to the character of charitable institutions. They are designed to help the poorer members of the community to help themselves by giving them an opportunity to make their small savings productive, and thus to confer upon them a greater and more lasting benefit than in many cases can be derived from mere eleemosynary assistance. Accordingly definite and rigid provisions have been made by our statutes for the administration of savings banks. Not to go outside the time here in question, see St. 1894, c. 317, §§ 13, *et seq.* It is not without significance that in this statute, as in former and subsequent ones, the governing board of officers is given the name of trustees. Careful provisions are prescribed also for the investment of the deposits that may be received; and it is manifest upon the most cursory reading that the dominant purpose of the Legislature has been to provide in this way for the safety of the money entrusted to savings banks and to hold the officers entrusted therewith to a strict accountability. As was said in *Lewis* v. *Lynn Institution for Savings*, 148 Mass. 235, 243, "the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner-stone of the whole system. . . . To others, to third persons, the corporation can incur liabilities, in contract or in tort, for which the funds in its hands will be responsible. But to the depositors themselves, the undertaking

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of the corporation is that it will receive and combine the deposits, and manage and use them to the best practical advantage, according to the judgment of the trustees, and give to the depositors in just proportion among themselves the result of such management." In other words, the savings bank and its managing officers or trustees are held to the same duty as ordinary trustees of a direct trust. See *Newark Savings Institution case*, 1 Stew. 552. For honest errors of judgment, while acting with ordinary skill and prudence, measured according to the demands of the duties or business which they have taken upon themselves, they are not to be held liable; but they cannot excuse themselves from the consequences of their misconduct or of their ignorance or negligence by averring that they have failed merely to exercise ordinary skill, care and vigilance. And so are the decisions as to the trustees or managing officers of savings banks in New York and New Jersey, in which such banks are not commercial institutions having a capital stock and conducted in whole or in part for the gain of their stockholders, but occupy the same position and are intended to serve the same beneficent purposes as is the case in this Commonwealth. It is held that the relation between the managing officers and the depositors, or the bank as representing them, is that of trustees and *cestuis que trust*. *Hun* v. *Cary*, 82 N. Y. 65, in which it was held also that where loss has occurred from the failure of such a trustee to exercise ordinary care and judgment, he cannot excuse himself by claiming that he did not possess those qualities; for by voluntarily assuming the position he undertook that he did possess and would exercise them. *Williams* v. *McKay*, 13 Stew. 189. *Williams* v. *Reilly*, 14 Stew. 137. *Dodd* v. *Wilkinson*, 15 Stew. 647, affirming *S. C. nom. Wilkinson* v. *Dodd*, 13 Stew. 123. And see *In re Liverpool Household Stores Association*, 59 L. J. Ch. (N. S.) 616. As was said by Beasley, C. J., in *Williams* v. *McKay*, *ubi supra*, "The equitable rule which is applicable to persons holding official positions such as were held by these defendants, is not in doubt. The duty belonging to such a situation is a plain one, — to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill

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and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind." This is the same rule of duty to which other trustees have been held, that they must "exercise a sound judgment and a reasonable and prudent discretion." *Davis, appellant,* 183 Mass. 499, 502. *Ashley* v. *Winkley,* 209 Mass. 509. *Pine* v. *White,* 175 Mass. 585, 590. The same rule has been applied to officers and managers of other financial institutions, somewhat similar in character to savings banks; and the doctrine is applicable *a fortiori* to the case at bar. Types of such decisions are *New Haven Trust Co.* v. *Doherty,* 75 Conn. 555, and *Wallace* v. *Lincoln Savings Bank,* 89 Tenn. 630.

We do not regard the allegation in the bill that the defendants "received salaries and fees from the complainant corporation for acting as its officers and trustees and members of its Finance Committee," as being in itself sufficient to hold them personally responsible for official misconduct and breaches of duty. But the averment is not made for that purpose. This is one of the existing circumstances in the light of which their conduct is to be judged. It is not necessary to aver the amount of their compensation or to show its adequacy. This allegation does not weaken the rest of the bill.

The same things may be said of the averment that the loans complained of, or some of them, were "made to assist in the real estate transactions of said George N. Rich, in which transactions said respondents were interested." This also bears upon the character of the defendants' conduct, upon the honest exercise of their judgment and their good faith. And the averments as to the personal dealings of some of the defendants with Dowlin and Rich, and as to the inducements, commissions and gifts given by Dowlin and Rich to two of the defendants, are proper for the same reasons. We see nothing here repugnant to the rest of the bill. Assuming that it may be singled out for a separate objection, the demurrer to it cannot be sustained.

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The statute already referred to (St. 1894, c. 317, §§ 21, 24) requires also that only first mortgages of real estate shall be taken, and that "no loan on mortgage shall be made except upon the report of not less than two members of the board of investment, who shall certify to the value of the premises to be mortgaged, according to their best judgment, and such report shall be filed and preserved with the records of the corporation;" and that "all applications for loans shall be made in writing, through the treasurer of the corporation, who shall keep a record thereof." The bill avers that the defendants failed to comply with these requirements. We have no doubt that these statutes are mandatory and not merely directory. They are part of a series of careful provisions made to secure the interests of depositors and to make it certain that the conduct of trustees in making loans upon mortgages should be not only honest and careful, but manifestly so, done with the concurrence of other officers, and spread upon the records of the corporation. These are restrictions placed by the Legislature upon the power of the defendants. A loan made without the observance of these requirements may be valid as between the bank and the borrower or as to third parties; *Gerrity* v. *Wareham Savings Bank*, 202 Mass. 214; but as between the defendants on the one side and the bank and its depositors on the other side their conduct in making loans in such a manner is *ultra vires*. It is a wrongful diversion of the funds of the bank. And the decisions are practically uniform that for such a wrongful diversion, made in excess of their authority and in defiance of the statutory requirements, they are to be held responsible. The decision in *Cocker* v. *Quayle*, 1 R. & M. 535, rests on this ground, although there it was the directions of a private trust, not the requirements of a statute, that were violated. So in *Worcester City Missionary Society* v. *Memorial Church*, 186 Mass. 531. Even the decisions by which the directors of a private business corporation have been exempted from liability for bare errors of judgment or for mere ordinary negligence in the exercise of their authorized functions have almost invariably refused, when the question has been considered, to extend that exemption to acts which were *ultra vires* or in violation of law. See for example *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480, 487; *Turquand* v. *Marshall*, L. R. 4 Ch. 376, 386; *In re Faure Electric Accumulator*

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Co. 40 Ch. D. 141; *In re New Mashonaland Exploration Co.* [1892] 3 Ch. 577; *Marzetti's case*, 42 L. T. (N. S.) 206; *Grimwade* v. *Mutual Society*, 52 L. T. (N. S.) 409, 416; *In re Liverpool Household Stores Association*, 59 L. J. Ch. (N. S.) 616; *Cooper* v. *Hill*, 94 Fed. Rep. 582; *Citizens Building, Loan & Savings Association* v. *Coriell*, 7 Stew. 383; *Stone* v. *Rottman*, 183 Mo. 552. For such a wrongful diversion of the funds of the savings bank, followed by and resulting in a total or partial loss of the money thus wrongfully withdrawn, the defendants are *prima facie* responsible. *New Haven Trust Co.* v. *Doherty*, 75 Conn. 555. *Paine* v. *Barnum*, 59 How. Pr. 303. *Paine* v. *Irwin*, 59 How. Pr. 316. *Williams* v. *Riley*, 7 Stew. 398. *Dodd* v. *Wilkinson*, 15 Stew. 647. *Williams* v. *McDonald*, 15 Stew. 392. *Thompson* v. *Greeley*, 107 Mo. 577. *National Bank of Commerce* v. *Wade*, 84 Fed. Rep. 10. *Fyler* v. *Fyler*, 3 Beav. 550. *In re Sharpe*, [1892] 1 Ch. 154. *In re Lands Allotment Co.* [1894] 1 Ch. 616.

The powers of the defendants were likewise, as between themselves and the bank or its depositors, limited by the terms of its rules and by-laws. This comes under the same general doctrine as limitations upon a trustee by the creator of a private trust, which already have been referred to. None of these matters affords ground for demurrer. As to them, the averments of the bill are sufficient. It was not necessary to allege the amounts of the assessors' valuations of the different parcels of real estate mortgaged, or to negative by anticipation any excuse or justification that the defendants may be able to set up for their illegal acts.

But the defendants insist that the statute of limitations is a bar to any remedy for most of their wrongful acts, because as to most of them more than six years had elapsed after their wrongful diversion of the plaintiff's money before the bill was filed. But this contention overlooks the fact, which has been sufficiently shown, that these defendants stood as to the bank and its depositors in the position of trustees of a direct trust. In such a case the statute of limitations does not begin to run against the *cestuis que trust* until they have learned of the trustee's wrongdoing or of his practical repudiation of the trust and of the duties thereby imposed upon him. *Davis* v. *Coburn*, 128 Mass. 377. *Jones* v. *McDermott*, 114 Mass. 400. *Boxford Religious Society* v. *Harri-*

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man, 125 Mass. 321. *Potter* v. *Kimball*, 186 Mass. 120. Instances of the application of the rule to such cases as the one now before us are sufficiently numerous. *Williams* v. *McKay*, 13 Stew. 189, reversing *S. C. nom. Williams* v. *Halliard*, 11 Stew. 373. *Williams* v. *Riley*, 7 Stew. 398. *Ellis* v. *Ward*, 137 Ill. 509. *National Bank of Commerce* v. *Wade*, 84 Fed. Rep. 10. *Brinckerhoff* v. *Roosevelt*, 143 Fed. Rep. 478. *In re Sharpe*, [1892] 1 Ch. 154. In most of the cases relied on by the defendants the case was either governed directly by statute, as in *In re Lands Allotment Co.* [1894] 1 Ch. 616, 631, and *Mason* v. *Henry*, 152 N. Y. 529, or it was held that no direct trust relation existed between the parties. Such cases need not be considered. So far as they differ from our conclusions we have not been willing to follow them. Nor is it now necessary to determine whether a fraudulent concealment of the cause of action is sufficiently charged against the defendants.

We cannot say as matter of law that the alleged foreclosures of the mortgages or the other dealings with the mortgaged properties, or any entries that may have been made on the plaintiff's books and records show knowledge in the plaintiff of the defendants' wrongdoings. See as to this *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630. The bill expressly avers that the plaintiff had neither such knowledge nor the means of acquiring it until shortly before the bringing of the bill. We find nothing in the allegations necessarily repugnant to this averment.

The sixteenth paragraph * of the bill might not of itself show any independent cause of action against the defendants, but like some other averments which have been considered, the circumstance alleged may throw light upon some of the misconduct complained of. It is proper to give the defendants notice of the fact that this is one of the matters relied on by the plaintiff in determining the character of their acts. It is not repugnant to the seventh paragraph † of the bill.

There is no such repugnance or uncertainty in other parts of

* This paragraph alleged that with the approval and on the vote of the defendants unlawful dividends were made to the depositors for the purpose of concealing the losses on the unlawful loans described in the bill.

† This paragraph set forth the by-laws relating to the duties of the trustees and of the financial committee.

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the bill as to justify us in calling it bad. The grounds of demurrer which have not been specifically dealt with have all been examined; the able argument made by the counsel for the defendants and the supplementary brief which has been filed have been carefully considered: and we are satisfied that the order must be

Demurrer overruled.

F. H. Nash, (*T. W. Streeter* with him,) for the plaintiff.

B. B. Jones, (*W. H. Brooks* with him,) for the defendants.

HANNAH CURRAN & others *vs.* JULIA O'MEARA & others.

Middlesex. December 14, 1911. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Voluntary Association, By-laws, Suspension of membership.

When the members of a voluntary association, which is a subordinate circle subject to the jurisdiction of a grand circle of a fraternal beneficiary order, have a beneficial interest in property and funds of such subordinate circle, they cannot be expelled or suspended from membership by the officers of the grand circle for non-payment of dues or taxes to the grand circle, under a by-law authorizing such expulsion or suspension for such cause, without reasonable previous notice of the charges against them and an opportunity to appear and be heard upon the subject, although the by-laws contain no provision requiring the giving of such notice.

BILL IN EQUITY, filed in the Superior Court, in substitution for a previous bill, on February 2, 1911, by the alleged officers and members in good standing of Ayer Circle, No. 478, Companions of the Forest of America, an unincorporated voluntary association existing under a charter granted by the Supreme Circle, Companions of the Forest of America, against persons alleged to have been former officers of said Ayer Circle and to have ceased to be such officers, against those persons claiming to be members of said Ayer Circle who recognized said defendants as such officers and against certain banks, to obtain possession of the record books, funds and property of the said Ayer Circle which might be in the possession or subject to the control of the defendants.

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The answers of those defendants who were alleged in the bill to have been former officers of said Ayer Circle alleged, among other matters, that they were at the time of the filing of the bill and continued to be such officers and were recognized as such officers by a large majority of those who were members of said Ayer Circle before November 1, 1910, and by all of the present members of said circle; and that the plaintiffs formerly were members of said circle and wrongfully had seceded therefrom and endeavored to assume its name.

The case was referred to William Harold Hitchcock, Esquire, as master. The important facts found by him are referred to in the opinion. The plaintiffs contended that all the members of Ayer Circle were suspended on November 1, 1910, by the grand chief companion of the Grand Circle of Massachusetts in accordance with the laws of the order and that the plaintiffs were the only members who subsequently were reinstated in accordance with those laws and therefore were entitled to the money and other property of the circle. The defendants disputed the validity of the suspension which they had disregarded.

The following is taken from the master's report:

"On November 1, 1910, the defendant Julia O'Meara was chief companion of the Ayer Circle, the defendant Katherine O'Neil its financial secretary and the defendant Minnie Murphy its treasurer.

"Prior to June, 1909, there had been certain internal dissensions in this order in Massachusetts and these troubles culminated at the annual convention of the Grand Circle of Massachusetts held at Springfield on the first Tuesday in June, 1909. As a result two rival conventions were held and two sets of grand officers were elected, each claiming to be the only legal convention and officers. These rival factions may be designated as the Mahoney and McCarthy factions, being thus named from the names of the grand officers most prominent in the disputes. This controversy eventually resulted in the withdrawal from the order of a substantial number of members and circles. Prior to June, 1910, many of the officers elected by the Mahoney faction and a substantial number of the circles of the order in Massachusetts withdrew from it and formed an independent rival order.

"A large majority of the Ayer Circle took sides with the Ma-

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honey faction and the circle considered the matter of seceding from the order, but acting upon advice of counsel did not do so. It paid the per capita tax imposed by the laws of the Grand Circle due in June, 1909, to the grand financial secretary elected by the Mahoney faction. It has paid no per capita tax to any person or representative of the order since that time. It has made no attempt whatsoever to do so. On December 7, 1909, the circle voted not to pay the tax then due. Subsequently it voted not to reconsider this action.

"The defendants testified that the tax was not paid because they did not consider Mrs. McCarthy and her associates the legally elected officers of the Grand Circle."

On October 24, 1910, Mrs. McCarthy as the grand chief companion, wrote to the Ayer Circle a letter addressed to the financial secretary, which contained the following: "I am personally visiting every circle in the state in an endeavor to help by advice or information in any way needed. . . . I would like to have the pleasure of meeting all your members, if I could, but could not ask you to notify them, if you will however let as many know as possible I would consider it a great favor."

"On the evening of November 1, 1910, Mrs. McCarthy accompanied by another grand officer visited the Ayer Circle at its regular meeting. She was met in the anteroom by the defendant O'Meara and requested to wait there a few minutes. Mrs. O'Meara returned to the hall and called the meeting to order.

"At this time the circle had ninety-eight or ninety-nine members and there were about twenty-five or thirty present at the meeting. During the meeting Mrs. O'Meara announced that there were visitors in the anteroom and, after the regular business had been transacted, she asked the outer guard to bring them in. . . .

"As Mrs. McCarthy and her associate entered the hall the meeting was closed. The defendant O'Meara then introduced the visitors and announced that they would doubtless be glad to speak if the members cared to hear them. Mrs. McCarthy then addressed the meeting. She announced that as grand chief companion she was visiting the circles of the order in Massachusetts. She complained of the manner of her reception and told of the cordiality with which she had been received by other circles.

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She declared her willingness to attempt to settle any grievance that they had with the Grand Circle or to advise them with reference to any differences among themselves. She fully explained the fact that the circle was in arrears in the payment of the per capita tax and pointed out the requirement of the laws of the order as to that tax and the effect upon the standing of the members of the failure to pay it. She declared that something must be decided regarding the standing of the Ayer Circle that night and asked those present who desired to remain loyal and to retain their membership in Ayer Circle to stand. Seven members arose, but one at once sat down again. Mrs. McCarthy continued her talk along the same lines and again asked those who desired to retain their membership to stand. The same six who remained standing before stood again. She then announced that she would be obliged to suspend the circle and let such members as desired apply for reinstatement. There was some discussion and some questions were asked about the Springfield convention and the standing of the Ayer Circle, but no action was taken or attempted by the meeting. Mrs. McCarthy for a third time asked those to stand who desired to retain their membership and only the same six stood. She asked the defendant O'Meara if her letter of October 24, 1910, had been read in the circle and was informed that it had not. She thereupon replied, 'Well, there is nothing left for me to do but to suspend the circle and I now suspend Ayer Circle and its members; you may apply for reinstatement or appeal from this suspension.' She then left the platform and the meeting broke up.

"No charges were formally preferred against the circle except such charges as Mrs. McCarthy made in her address and no notice was given of any proposed suspension except such notice as was given in that address. The letter of October 24 was the only communication that passed between Mrs. McCarthy and the circle or its officers prior to November 1, 1910. The members not present at the meeting had no notice whatsoever of the proceedings until subsequently informed."

The master made the following findings: "I find and rule that no reasonable notice was given Ayer Circle of the proposed action of Mrs. McCarthy and that the circle as a whole and particularly the members not present on November 1 did not have an

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opportunity to be heard upon the matter of the payment of the per capita tax or of the suspension of the circle. If such notice had been given by Mrs. McCarthy to the circle, its officers could have notified all the members and those who were absent on November 1, could, if they desired, have been present and protected their rights in the circle and its property. Possibly if there had been a full attendance on November 1, the action of the circle would have been entirely different. There was no evidence before me that any list of the members of Ayer Circle was in the possession of the Grand Circle of Massachusetts or any of its officers.

"I find, however, that the refusal and the failure of the circle to pay the per capita tax prior to November 1, 1910, was the act of the circle as a whole and not that merely of its officers. I find that that refusal was wilful and intentional and that therefore a valid cause for suspension in fact existed on November 1, 1910.

"The plaintiffs contend that the action of Mrs. McCarthy as grand chief companion in suspending Ayer Circle and in thereafter reinstating the plaintiffs and reorganizing them as Ayer Circle was a valid execution of a power given her by the laws of the Grand Circle of 1910, Article VI., Section 1, F. I. and J. They therefore contend that they alone are members in good standing of the Ayer Circle and that the officers elected by them are entitled to the possession of the funds and property of the circle.

"Clause F of this section in question gives the grand chief companion the power 'to suspend any subordinate circle under the jurisdiction of this Grand Circle for cause, subject to appeal as hereinafter provided.' If this provision be interpreted to require reasonable notice to an offending circle of a proposed suspension and an opportunity to be heard upon charges made against it, then Mrs. McCarthy did not comply with this law and her action in suspending the circle is invalid. If, on the other hand, the by-law be interpreted to authorize the suspension of a subordinate circle without notice and without an opportunity to be heard, I am of opinion that this provision is unreasonable and invalid and that the action of Mrs. McCarthy was therefore without authority and void. In either event the result is the same.

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"As a conclusion therefore from the foregoing findings and rulings I find and rule that the defendants named in the bill and those represented by them continued to be members in good standing of Ayer Circle down to the time of the filing of the bill, notwithstanding the acts of Mrs. McCarthy, and that the defendants named in the bill continued to be the officers of Ayer Circle and are entitled to the possession of its funds and property.

"In the event that it be held that the by-law upon which the plaintiffs rely authorizes a suspension without notice and that so interpreted it is a valid by-law, I find and rule that the defendants named and those represented by them have been legally suspended from Ayer Circle, that the plaintiffs are members in good standing of that circle and that the officers elected by the plaintiffs are entitled to the possession of the funds and property of the circle."

Other findings of the master are stated in the opinion.

The case was heard upon the bill and answer and the master's report by *Pierce*, J., who made a decree that the bill be dismissed. The plaintiffs appealed.

H. L. Brown, (*E. Field* with him,) for the plaintiffs.

J. M. Maloney, for the defendants.

BRALEY, J. The plaintiffs not having excepted to the master's report, the question before us is whether upon his findings the decree dismissing the bill should be affirmed. The parties were members of Ayer Circle, No. 478, of the Companions of the Forest of America, a secret fraternal beneficiary order, composed of a supreme circle with grand circles and subordinate circles, each of which is a voluntary association. It had an elaborate system of general laws for its own government and for the creation and government of grand and subordinate circles. A grand circle having been duly organized in this Commonwealth, Ayer Circle was recognized as a subordinate circle under the jurisdiction of the grand circle and subject to all general laws then in existence or which might thereafter be adopted by the grand circle under the power reserved to that body in the general laws to make changes. By reason of internal dissensions the order in this jurisdiction became divided into two factions resulting in two rival annual conventions, where the officers elected by each claimed to be the only legal officers of the grand circle. It is

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stated, that a large majority of the members of Ayer Circle were favorable to one faction in preference to the other, but did not secede from the order, and paid the capitation taxes for that year to the financial secretary elected by the convention with which it was in sympathy. It does not appear that the rival faction ever called or held an annual convention, and when the time came for calling the next convention the position of grand financial secretary was held by an incumbent in possession of the office, who performed its duties, and the notices for the convention were issued in discharge of her secretarial functions as prescribed by the general laws. It was unnecessary for the plaintiffs to offer further proof of her authority. *Attorney General* v. *Crocker*, 138 Mass. 214. *Fitchburg Railroad* v. *Grand Junction Railroad & Depot Co.* 1 Allen, 552, 557. The master having found that this convention was called and held with a quorum of officers and delegates in accordance with the laws of the order, he rightly ruled, that Julia A. McCarthy was legally elected grand chief companion of the grand circle, and that her election was binding upon all subordinate circles. The convention also adopted a revision of the grand laws of the grand circle, which, having been approved by the supreme supervisor of laws, became effective even if no copy was sent to Ayer Circle, or to any of its members. By article sixteen, section two, of these laws it was provided among other causes for dissolution, that a subordinate circle may be dissolved "for improper conduct," and "for neglecting or refusing to make returns, or for non-payment of dues or taxes to the grand circle," and by article six the grand chief companion was authorized to suspend any subordinate circle for cause, subject to the right of appeal to the grand executive council, and from this body to the grand circle.

But if Ayer Circle was in arrears for capitation taxes, which the master finds were intentionally withheld, and there is plenary evidence in the report that a majority of its members refused to recognize the authority of the grand chief companion, or of the grand circle, the summary and arbitrary conduct of Mrs. McCarthy in suspending the circle and taking its charter, without giving any notice of her purpose, was in violation of the property rights of the members, which cannot be distinguished from the rights of the circle as a voluntary association. The grand laws contain no

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provisions for notice to the circle or to its members before this authority could be exercised. Yet it is manifest from the very full statements in the report that membership conferred beneficial interests in a very appreciable fund in possession of the treasurer, who has not been joined as a party, as well as in other valuable property and paraphernalia now held by the defendants and formerly used by the circle at its meetings in accordance with the rules and ritual prescribed by the order. *McFadden* v. *Murphy*, 149 Mass. 341. If the object of the grand chief companion had been fully accomplished it would have dissolved the circle, the defendants would have been excluded, and the fund and other property would have been transferred to those members who adhered to the grand circle as then constituted and represented by her. The subordinate circle as a constituent part of the order and a majority of its members may have been amenable to discipline, even to the point of suspension and expulsion, but until reasonable notice in some appropriate form had been given to the members of the charges, with the opportunity to appear and to be heard upon the subject, neither the grand chief companion nor the executive council or the grand circle could deprive a subordinate circle, or any of its members, of these valuable rights. *Murdock's case*, 7 Pick. 303. *Murdock* v. *Phillips Academy*, 12 Pick. 243, 264. *Gray* v. *Christian Society*, 137 Mass. 329. *Karcher* v. *Supreme Lodge Knights of Honor*, 137 Mass. 368, 372. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326, 335, 336. *Sabourin* v. *Lippe*, 195 Mass. 470, 479. *Wachtel* v. *Noah Widows & Orphans' Benevolent Society*, 84 N. Y. 28.

Nor are the defendants concluded from making this defense, because they resorted to an appeal as provided by the general laws, in which the acts of the grand chief companion were affirmed. The appeal, even if entered with the grand financial secretary who lawfully held the office, was not prosecuted by them, and no notice having been given to the defendants of the proposed expulsion or suspension, the appellate tribunals were without jurisdiction. An act originally void could not be made valid by their appeal. *Hoeffner* v. *Grand Lodge of the German Order of Harugari*, 41 Mo. App. 359, 367. *People* v. *Women's Catholic Order of Foresters*, 162 Ill. 78, 82, 83.

The proceedings of suspension, followed by reinstatement of

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the loyal members and the reissue of the charter to them having been unauthorized, the association has not been dissolved, and the plaintiffs cannot maintain their suit.

Decree affirmed.

MARY L. SMITH *vs.* GEORGE E. JORDAN.
GEORGIANA B. SMITH *vs.* SAME.

211 — 545
213 — 303

Middlesex. January 8, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Of servant. *Agency*, Existence of relation. *Automobile.*

In an action against the owner of an automobile for injuries from a collision caused by the negligence of a minor son of the defendant who was operating the car, if it appears that the defendant had bought the car for the general use of his family, that it was registered in his name but that the only member of his family licensed to operate it was his minor son and that it never was operated except by the son, that the defendant had given his wife permission to use the car whenever she wished without making any special request and expected the son to mind his mother if she asked him to take her out with the car, and that the collision occurred when the son was driving the car in transporting his mother at her request, there is evidence for the jury that the car at the time of the accident was being operated upon the business of the defendant under authority from him.

TWO ACTIONS OF TORT, the first for personal injuries from being run into from behind by an automobile of the defendant operated by the defendant's minor son, alleged to have been an agent of the defendant, while the plaintiff was driving in a carriage on Lexington Street in Waltham at about 5.15 P. M. on November 22, 1907, and the second by the mother of the plaintiff in the first case for injuries caused to the carriage by the collision. Writs dated February 25, 1908.

In the Superior Court the cases were tried together before *Fox*, J. The facts which could have been found upon the evidence are stated in substance in the opinion.

At the close of the evidence the defendant in each of the cases asked for thirteen rulings. Of these the judge gave as instruc-

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tions to the jury the second and third and the seventh in a modified form as follows: "2. The fact that the automobile was being driven by the defendant's son is not enough to make him liable. A father is not responsible for the negligence of his minor son, merely because of the relationship between them. 3. It would not be enough to make this defendant responsible for any negligence of his son in the operation of the automobile that he had given his wife and son permission to use the machine at their pleasure." 7 (as modified). "It is not enough to make this defendant responsible that he knew that his wife and son were accustomed to use the automobile, and acquiesced in that custom; the plaintiff must go further and satisfy the jury that, in taking his mother to ride, the son acted in obedience to his father's general or special commands, either express or implied."

Among the rulings requested by the defendant were the following:

"1. The evidence is not sufficient to warrant a verdict for the plaintiff."

"4. If the defendant had directed his son not to be out with the automobile after dark, and the son was out after dark, at the time of the accident in violation of that direction of his father, the defendant cannot be held liable for the accident.

"5. If the defendant's son in remaining out with the automobile after dark was acting contrary to the defendant's orders, it would not be enough to make the father responsible for his negligence, that he did so at the persuasion of his mother."

"13. The evidence does not warrant a finding that, at the time of the accident, the son was using the car upon any business of his father, as alleged in the declaration."

The judge refused to make these rulings. He also refused to make the other rulings requested by the defendant, the general character of which is stated in the opinion.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

G. L. Mayberry, (*J. M. Gibbs* with him,) for the defendant.

C. W. Bond, (*G. F. Wales* with him,) for the plaintiffs.

RUGG, C. J. The principles of law which govern this case are plain. A father is not liable for the torts of his minor son, simply because of paternity. There must exist an authority from the father to the son to do the tortious act or a subsequent ratifi-

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cation and adoption of it, before responsibility attaches to the parent. This authority may be express or it may arise by implication from all the attendant circumstances. The wrongful act must be performed by the son in pursuance of the business, incident or undertaking authorized by the father before the latter can be held liable. Such authority may be found in the actual presence of the parent, in express or implied direction, or in a precedent course of conduct. If the act is within the general scope of authority conferred by the father, or in carrying out the enterprise for which the minor has been commissioned, then the father may be liable even though he had no knowledge of the specific conduct in question and it was contrary to his direction. If the act is not done by the son in furtherance of the father's business, but in performance of some independent design of his own, the father is not liable. The controlling rules of law are the same whether the business in question concerns the operation of an automobile or any other matter.

In the case at bar, a father had bought an automobile for the general use of his family. It was registered in his name, but the only member of his family licensed to operate it was his minor son and the machine never was operated except by him. The defendant testified in substance that his wife had his permission to use the automobile whenever she desired, without making any special request for it, and that he expected his son to mind his mother if she asked him to take her out with the car. The plaintiff was injured by a collision with it under circumstances which warranted a finding that the son was negligent, on an afternoon when he was driving the car with his mother, at her request. These facts warranted the inference that the son was then acting in accordance with general instructions expressly or impliedly given by his father. The boy was not running it for any purpose of his own, but for the convenience of his mother and by her express direction, for whose use in common with the rest of the family it had been purchased by his father. If the father had employed a chauffeur outside the family at a stated compensation, it could not be contended seriously that taking the wife out for an afternoon call was not the business for which he had been employed. If, instead of hiring a stranger, the father chose to have the same work performed by his minor son, to

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whose time and services he was entitled as a matter of law, it could not be ruled as matter of law that a jury might not find the business to be that of the father. This is not a case of mere permissive use of the father's vehicle by the son for his own pleasure. Although the father had no knowledge of the particular journey which was taken on the occasion of the accident, his knowledge that on previous occasions the wife had used the car and his testimony of the purpose for which it was bought and that it was not customary when the wife was going on errands with the automobile to ask his permission were enough to support a finding that the trip in question was authorized by him. The fact that the son was the only person in the family who could legally operate the car had some tendency in that direction. The relation of husband and wife is such that, when the former has purchased an automobile for family use, a ride by the wife in it with his general permission is not as matter of law the business of the wife, but may be found to be that of the husband. *Bourne* v. *Whitman*, 209 Mass. 155. *Hunt* v. *Rhodes Bros. Co.* 207 Mass. 30.

There was no error in refusing the defendant's requests for instructions. There does not appear to have been evidence warranting the ruling that if the defendant had directed his son not to be out after dark and the son was driving after dark in violation of that direction, the defendant could not be held. There was evidence that the defendant had instructed the son that he should not be out after dark. But he also testified that he did not intend the car should not be brought home if he chanced not to get home earlier and that it "was a caution." But upon a broader ground, the rulings upon this point could not have been given properly. The jury might have found that the business of the father in this connection was that the son should follow his mother's direction. If this involved being out after dark, it was still the father's business. There seems to have been no dispute that the son was doing as his mother had told him. So far as the substance of the other requests was not given in the charge they either were not applicable to the evidence or not sound in law.

Exceptions overruled.

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JOHN E. GREEN *vs.* J. WINTHROP NIGHTINGALE. 217 - 2
217 - 83

Suffolk. January 9, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Of one controlling real estate.

In an action for injuries sustained from being struck by a board falling from the roof of an unoccupied house owned and controlled by the defendant while the plaintiff was walking near it on the highway, where there is evidence of the dilapidated condition of the house and of the rottenness of the board that fell from the roof upon the plaintiff and also of the defendant's failure to attend to the house or to make any repairs upon it, the question of the negligence of the defendant is for the jury.

In an action for an injury to a traveller upon a highway by reason of a rotten board falling upon him from the roof of an unoccupied and neglected house owned and controlled by the defendant, it is proper for the presiding judge to refuse to make a ruling which correctly states the obligation of a landlord to a tenant but has no application to the case on trial.

TORT for personal injuries from being struck by a board which fell from the roof of an unoccupied dwelling house on Newbern Street at the corner of Sterling Street in Boston owned and controlled by the defendant, while the plaintiff was travelling on the highway shortly after twelve o'clock, noon, on February 10, 1909. Writ in the Municipal Court of the City of Boston dated February 12, 1909.

On appeal to the Superior Court the case was tried before *Fox,* J. The jury took a view of the house. The boards which fell from the building when the plaintiff was struck were picked up by the plaintiff after his injury and were spread on the floor of the court room in front of the jury. The plaintiff, who was a carpenter and a general all round man, was going to dinner when the accident happened. He testified, among other things, that the day of the accident was stormy, that it was raining and the wind was blowing, that he was close to the house when struck, that he had passed by the house before the accident, but not very frequently; that it was in bad condition, dilapidated, an old building, that he had noticed it for about four years, that no repairs, to his knowledge, had been made on the house during that time,

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that he had never seen the defendant around the house before the accident; that he should say these boards were in a very rotten condition, twenty-five or thirty, or perhaps forty years old, and perhaps older. The plaintiff further testified that it was pretty hard to tell where the nails went in these boards because they were all rotten, that in his opinion the boards fell because the nails were all rotted out and would not hold the weight of the boards and that in his opinion an examination of the building by an ordinary caretaker would have disclosed the dangerous condition of those boards. A witness, whose business was real estate and who took care of buildings near the one in question, testified that he had known the defendant's building for seven or eight years, that it last was occupied three or four years before the trial, and that since it had been unoccupied it was "gradually wasting away." There was evidence that the windows of the building were boarded up, that the doors were boarded up and broken and that the roof looked in bad condition around the sides.

Other evidence is stated in the opinion.

The three rulings which were requested by the defendant and refused by the judge are stated in the opinion. The portion of the judge's charge referred to in the opinion as covering the third ruling requested by the defendant was as follows:

"Now, suppose we have the case of shingles blowing off the roof of the building in a gale of wind, that is one case, and one of them hitting a passer-by, then take another case, there is a hanging, a heavy hanging sign, hanging directly over the sidewalk supported by iron brackets, that is another case, and you as men of common sense can see that there is a difference in those two cases. You may say that as a man of ordinary care the owner should not be expected as long as his roof is not leaking, not disturbing the tenants, he should not be expected to go over that roof and give it daily or weekly, or even monthly inspection for fear that some shingles might be loose and might fall in a gale of wind on the passerby, that degree of caution shouldn't be exacted from the owner, but on the other hand suppose you have a heavy wooden sign hanging over the sidewalk supported by two iron bolts, if that sign falls, it is certain to hurt somebody, if that somebody happens to be under it, and there are only two supports to it. Now you may say that ordinary care requires that the

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owner of that building should look at that sign occasionally to see whether it is held, whether it is firmly placed or not. After all the question is for you to determine, having regard to the circumstances, whether ordinary care was used by the owner of this building to protect, to prevent injury to the public. The question whether he allowed that building to be dilapidated and unsuitable for the purposes of letting is not of any consequence unless you find that that degree of dilapidation endangers the public walking upon the public streets. That is the question for you to determine. Now there is this testimony with regard to the boys. What shall we say about the boys? Well, if it is perfectly clear that if that building was in a reasonably safe condition till the boys loosened some of the boards and if the owner, — if the accident happened because the boys loosened some of those boards and before the owner learned of it, or by the exercise of reasonable care could have learned of it, then he is not responsible. The question is whether you can impute to him or to any of his servants as a cause of this accident, lack of the use of ordinary care in protecting the public from injury by the falling of boards from his building."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. A. Abbott, for the defendant.

P. Daly, for the plaintiff.

RUGG, C. J. This is an action of tort in which the plaintiff seeks to recover compensation for injuries sustained by him while a traveller upon a public way from boards falling from a house owned by the defendant. The charge of the Superior Court was in general in accordance with *Ainsworth* v. *Lakin*, 180 Mass. 397, portions of the opinion being read to the jury. The only questions arise from the refusal of the trial judge to give rulings requested.

1. The request to direct a verdict for the defendant was denied rightly. Evidence as to the dilapidated appearance of the house, the falling of the boards and their condition, the lack of attention of the defendant to the house and all the other attendant facts raised a question for the jury as to the negligence of the defendant.

2. While the request to the effect that if there was a hidden defect in the board which caused the injury or in its attachment

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to the building it must appear that the defendant either knew or ought to have known of the existing danger, is a correct statement of the obligation of a landlord to a tenant (*Shute* v. *Bills*, 191 Mass. 433), there was nothing in the case at bar which called for the application of this rule.

3. There was evidence tending to show that on a Saturday afternoon early in February, 1909, the accident having occurred on February 10, some boys were seen on the roof of the defendant's house stripping up boards such as injured the plaintiff and that at the hour of the accident the wind was blowing a gale.

In this connection the request was made to instruct the jury that if the condition of a structure has been rendered dangerous by *vis major* or the act of a third person, which the owner had no reason to anticipate, he cannot be held liable for the injury or be bound to make the structure safe until he has had a reasonable time after it has become dangerous to take necessary precautions to prevent injury. This is the law. *Mahoney* v. *Libbey*, 123 Mass. 20. There was evidence to which it was applicable. The rule given upon this branch of the case, although not in the language of the request, stated the principle with sufficient amplification and illustration to protect the rights of the defendant. The *vis major* upon which the defendant relied was the gale operating directly and immediately to cause the injury and not rendering the building so unsafe as to require repair. Therefore, the duty resting upon the defendant was one of previous reasonable inspection, so far as common prudence under all the circumstances required it, to see that the condition of the roof was such as not likely to cause harm to passers-by. As to the intervening tortious act of third persons causing the dangerous condition, the rule was stated with accuracy.

Exceptions overruled.

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LOUISE N. BROOKS *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. January 10, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Parties, Amendment, Dismissal of action, Stipulation in report to full court. *Executor and Administrator.*

An action purporting to be brought for injuries sustained by a person named as the plaintiff, who died before the date of the writ and for whose estate no executor or administrator had been appointed, has no legal existence, and an administrator subsequently appointed cannot be made the plaintiff by an amendment under R. L. c. 173, § 48.

An action nominally standing upon the docket of the Superior Court, which in legal effect never has been brought because at the date of the writ there was no person who could bring it, should be dismissed, and it is wrong to order a verdict for the defendant.

A stipulation contained in the report of a case for determination by this court, that if the rulings of the Superior Court were wrong "the case should stand for trial," here was held to mean that the case should stand for such disposition as was required by the decision of this court.

TORT brought in the name of Louise N. Brooks for injuries sustained by her on September 5, 1905, when she was a passenger on an electric street car of the defendant, by reason of a collision with another car of the defendant. Writ dated July 18, 1908.

The case came on for trial before *King*, J. It appeared that Louise N. Brooks, who was named as plaintiff, died on February 12, 1907, the year previous to the date of the writ, and that on March 11, 1909, the year after the date of the writ, George H. W. Pulsifer was appointed administrator of her estate. It was admitted that there was sufficient evidence of negligence of the defendant and of due care on the part of Louise N. Brooks to have warranted a jury in finding for the plaintiff, if the action had been brought and tried during the lifetime of Louise N. Brooks.

The administrator of the estate of Louise N. Brooks moved "that the writ and declaration be amended by striking out in each the name of Louise N. Brooks as party plaintiff and sub-

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stituting therefor the name of George H. W. Pulsifer, administrator of the estate of Louise N. Brooks."

The judge ruled that he did not have power to allow the amendment and denied the motion, subject to the exception of the administrator. At the request of the defendant the judge ordered a verdict for the defendant, and by agreement of counsel reported the case for determination by this court upon the following stipulation: "If the rulings of the Superior Court were right in denying the said motion and in directing a verdict for the defendant, judgment should be entered for the defendant; if, however, the rulings of the Superior Court were wrong, the case should stand for trial."

The case was submitted on briefs.

L. T. Trull & F. N. Wier, for the defendant.

J. J. O'Connor, for the plaintiff.

RUGG, C. J. The question is, whether an action for personal injuries can be maintained, which is brought after the death of the person injured and before the appointment of an executor or administrator in which the dead person is named as party plaintiff. The cause of action which accrued to Louise N. Brooks during her life was not extinguished with her death, but might have been prosecuted by her executor or administrator. R. L. c. 171, § 1. The writ is dated about seventeen months after her death and eight months before the appointment of the administrator of her estate. Nothing further appears as to the human agency by which the alleged action was instituted except that a declaration filed long after her death and long before the appointment of her administrator is signed by an attorney.

An action at law implies, by its very terms, the existence of a person who has the right to bring the action. *Patterson* v. *Patterson*, 59 N. Y. 574, 578. It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is "dust and ashes," sacred to kin and friends, whose feelings and rights in this regard receive the protection of the law, but having no inherent capacity. *Feeley* v. *Andrews*, 191 Mass. 313. No harshness is wrought by this rule, for from early times our statute of limitations has made some provision for extension in the event of death of a person entitled to bring an action (see R. L. c. 202, § 10, and marginal

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annotations) and the law also allows a special administrator, who may be appointed at any time without notice, to bring actions. See R. L. c. 137, § 10.

It is urged, however, that under our statute allowing amendments, the administrator now appointed may be substituted as party plaintiff. The essential words of that statute, R. L. c. 173, § 48, are that "the court may . . . allow any other amendment in matter of form or substance in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought." This language in plain words indicates the existence of a real plaintiff as the original instigator of the action. It gives no countenance to the idea that something phantasmal and visionary may be given a body and a substance by the aid of subsequent events. It presupposes a plaintiff. Here there was no plaintiff. It assumes an intent. The amendment must be bottomed on an intent contemporaneous with the bringing of the action. But one who is dead cannot have an intent in any earthly sense.

Lewis v. *Austin*, 144 Mass. 383, gives no support to the contention now urged. That was a case where a live person having a valid claim, which he was obliged to prosecute in the name of another, by inadvertence used the name of one who had died. But the real plaintiff was alive. As was pointed out in the opinion, if he had brought the action in his own name, clearly an amendment could have been allowed. So also if brought in a fictitious name. Moreover, there had been appointed an administratrix of the estate of the deceased person in whose name the action might have been brought. *McLaughlin* v. *West End Street Railway*, 186 Mass. 150, is manifestly distinguishable. There both the plaintiff and the cause of action were in existence. A wrong defendant was named in the writ. The present decision does not impair in any degree that which has been said in these and many other cases as to the liberality with which amendments are allowed under our practice. It only holds that where, in the nature of things, no person can be plaintiff and the cause of action is in suspense, an action cannot be instituted. If no action can be instituted, there is nothing to amend.

The ruling of the Superior Court was wrong in ordering a verdict for the defendant. No judgment can be entered in a case

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which never has had an existence and is a nullity. The action should be dismissed. Under the terms of the report the case is to "stand for trial." This means that it should stand for such disposition as is required by this opinion.

So ordered.

MARIA DIIORIO *vs.* JORDAN MARSH COMPANY.
MARTIN A. DIIORIO *vs.* SAME.

Suffolk. January 10, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway.

At the trial of an action for personal injuries by a woman against the owner of a horse and wagon, there was evidence that the plaintiff was moving a large box along the side of a street from one store to that next adjoining, that the street and the sidewalk were narrow and crowded, that the box rested partly on the curb and projected into the street, that the plaintiff proceeded backward pulling on the front of the box, while a helper pushed the opposite end, and that the plaintiff did not look around at any time and was run into by a wagon being driven rapidly on its right hand side of the street by an employee of the defendant who was not attending to his duties. *Held*, that there was evidence that the plaintiff was in the exercise of due care.

TWO ACTIONS OF TORT, the first for personal injuries alleged to have been caused by the plaintiff's foot being run over by a wagon driven by an employee of the defendant, and the second by the husband of the plaintiff in the first action for loss sustained by reason of her injuries. Writs in the Municipal Court of the City of Boston dated January 12, 1910.

On appeal to the Superior Court the cases were tried together before *Lawton*, J. There was evidence that the wagon of the defendant was being driven rapidly and that the driver was "fooling" with a man on the seat with him. Other facts material to the decision are stated in the opinion. At the close of the evidence the defendant asked for rulings that the plaintiffs could not recover. The rulings were refused. The jury found for the plaintiff in the first action in the sum of $321, and for the plaintiff

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in the second action in the sum of $165; and the defendant alleged exceptions.

E. C. Stone, for the defendant.

J. A. Petitti, for the plaintiffs.

RUGG, C. J. There was evidence tending to show that the female plaintiff (hereafter referred to as the plaintiff) was pulling upon a wooden box about a yard and a half long, three feet wide and four feet high on the sidewalk of Salem Street in Boston, at eight o'clock in the evening. The box was partially on the sidewalk, and projected somewhat over the curb into the street. It was so heavy that two persons were moving it from one store to the next store. The plaintiff was pulling backward with one foot in the street and the other on the sidewalk, while her helper was pushing on the other end of the box. When it had been moved about a yard, the defendant's wagon being driven on its right side of the street, which at this point was congested with traffic and about twenty feet wide, injured the plaintiff. The wagon came upon her from behind, and she had not looked around once while helping to move the box. There was testimony strongly contradicting this version of the way the accident happened, but it cannot be ruled as matter of law that the jury may not have found these to be the facts. The single question presented is whether the plaintiff legally could have been found by the jury to have been in the exercise of due care.

The plaintiff was a traveller upon a public way. It was lawful for her to move the box from one store to another on the same side of the street. There was a narrow sidewalk on a narrow street, and both were crowded. It cannot be said that there was any lack of care in selecting the curb of the sidewalk as the portion of the way in which to move the box. The circumstances in which the plaintiff was placed were somewhat unusual. She was pulling at a box which by its size and shape afforded a considerable protection. It projected into the street probably farther than her body. It was so large that it would not escape the observation of any careful driver on the street. It was being moved slowly, and by protruding into the street might cause her to think that others would avoid collision with it, and that by reason of her nearness to it and partial shelter by it she might relax her outlook for danger. Although one must use proper

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care while upon a public way, he may rely in part upon the presumption that other travellers will use a reasonable degree of care. Moreover, the plaintiff was being aided by a man at the other end of the box, who was facing in the direction from which any team would come, and on whom, without express stipulation to that effect, on account of his opportunity for constant knowledge of her position, she might in some slight degree rely to warn her of approaching harm. Her purpose was to move the box only a very short distance.

Ordinarily, one walking backward on such a street would be lacking in due care. But the present facts are in a measure exceptional, and, though close to the line, the plaintiff's conduct cannot in our opinion be pronounced negligent, as matter of law. *Donovan* v. *Bernhard*, 208 Mass. 181. The case at bar is distinguishable from *Flansberg* v. *Heywood Brothers & Wakefield Co.* 190 Mass. 125; *S. C.* 199 Mass. 410, and *Russo* v. *Charles S. Brown Co.* 198 Mass. 473.

Exceptions overruled.

LYMAN A. BOWKER & others *vs.* ADELAIDE J. TORREY & another.

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Suffolk. January 12, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Demurrer, Parties. *Equity Jurisdiction*, To correct mistake, For an accounting, Laches, Statute of limitations. *Partnership.*

Real estate which was purchased and maintained with funds of a partnership composed of three partners was held by them in equal undivided shares as tenants in common. After the death of two of the partners, the surviving partner and persons representing respectively the interests of the deceased partners, after open and fair negotiations and such examination of the books of the partnership as any of them desired to make, adjusted the affairs of the partnership by forming a corporation to which was conveyed all the personal property assets of the partnership, the corporation assuming all of the partnership debts, the title to the real estate remaining unchanged, and the mutual accounts with the partnership of those representing the interests of the partners being adjusted by a division among them of the shares of the capital stock of the corporation. In making the division the representative of one of the deceased partners because of a mistake was given more than his share, and,

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after the corporation had continued in business for six years and its capital stock had become or been found to be worthless, a bill in equity alleging the foregoing facts was brought against him by the person who represented the interest of the other of the deceased partners and who alleged that the plaintiff should have received a larger share in the adjustment. On demurrer to the bill it was *held*, that the bill could not be maintained to change the character of the arrangement entered into six years before in entire good faith, or to give the plaintiff a lien upon property into which the defendant had converted his interest in the real estate formerly of the partnership; but that it might be maintained for an accounting to rectify the mistake made by the parties and to compel such a readjustment, as between the parties in the suit, of the division of the shares of stock of the corporation at its par value, or in some other way, as would accomplish that end.

A suit in equity for an accounting as to an adjustment of the affairs of a partnership which was made immediately after the death of one of the partners six years before the filing of the bill, and for the rectification of a mistake then made whereby the defendant received too much and the plaintiff received too little of the capital stock of a corporation which succeeded the partnership, may be maintained although six years have elapsed since the adjustment and the corporation has been doing business during that whole time and its capital stock has become or has been found to be of no value, if the mistake was not discovered by the plaintiff until shortly before the suit was commenced.

A demurrer to a bill in equity setting forth a claim against an executor or administrator will not be sustained on the ground that the suit is barred by the special statute of limitations, R. L. c. 141, § 9, where it is not alleged in the bill that any notice of the defendant's appointment as required by R. L. c. 139, § 1, had been given by the executor.

In a bill in equity for an accounting to rectify a mistake made in the adjustment of the affairs of a partnership composed of three partners after the death of two of the partners by the formation of a corporation and the payment in capital stock of the corporation of amounts found to be due to persons representing the interests of the former partners, the plaintiff, representing the interest of one of the deceased partners, alleged that he had received too little and that the defendant, who represented the interest of the other deceased partner, had received too much in the division. The defendant demurred on the ground that the surviving partner and the corporation were necessary parties. *Held*, that the demurrer should be overruled, because, although it might ultimately appear that the surviving partner and the corporation were necessary parties, they were not shown to be so by the allegations of the bill.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 8, 1911, and afterwards amended, by Francis E. Bowker, executor and trustee under the will of Edwin Bowker, late of Waltham, and the beneficiaries under that will, against Adelaide J. Torrey and Charles T. Gallagher, conservator of her property, seeking relief from a mistake committed in the adjustment, after the deaths of Edwin Bowker and Charles Torrey, of the affairs of the

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partnership of Bowker, Torrey and Company, formerly composed of Edwin Bowker, Franklin Torrey and Charles Torrey. From the allegations of the bill it appeared that Adelaide J. Torrey was the executrix of and sole devisee under the will of Charles Torrey and was his widow.

Specific allegations relating to delay in the bringing of the bill were as follows: "The plaintiffs, with the exception of Francis E. Bowker, executor and trustee, never knew the facts herein set forth until shortly before filing this bill, and the plaintiff Francis E. Bowker, executor and trustee, who was acquainted with the facts, except as to the amount of the true indebtedness of Charles Torrey to the firm, of which he was ignorant, in all matters relating to the formation of the corporation, the transfer of property to the corporation and the distribution of its stock and all matters relating to the settlement of the partnership affairs, acted under a misapprehension as to the effect upon the rights of the parties of omitting the said real estate from the transfer to the corporation, while, at the same time, proceeding in all other respects as though the real estate had been so conveyed, and never discovered the effect of said purported settlement until shortly before the filing of this bill."

The bill also alleged, with regard to the death of Charles Torrey and the appointment of his executrix, that he died on April 9, 1905, and "by his will devised and bequeathed his property, real and personal, to his widow, the defendant Adelaide J. Torrey, and thereby constituted her sole executrix thereof. The defendant Adelaide J. Torrey was appointed executrix by the Probate Court of Suffolk county, and duly qualified" at some time previous to July 29, 1905. There was no allegation that the executrix had given the notice required by R. L. c. 139, § 1.

The bill also contained the following allegation: "The plaintiffs bring this bill for the benefit of Franklin Torrey, as well as for themselves, if, upon learning the facts, he desires to become a party plaintiff and join in the expense thereof."

Other allegations of the bill are stated in substance in the opinion.

The second prayer of the bill was as follows: "That the settlement of the partnership affairs made on or about April 30, 1905, may be reopened so far as necessary to correct the errors herein set forth, namely, by charging the share of Charles Torrey with

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interest on his overdrafts, and readjusting and correcting the amount due from him and the amounts due to the plaintiffs according to the facts set forth herein, and that the defendant Adelaide J. Torrey may be charged with such sums as she may be shown to have received in excess of the sum to which she was entitled, and the amount which in justice and equity ought to have been paid to the plaintiffs determined and established." In the third prayer the plaintiffs asked that a trust might be decreed and enforced against property which the defendant Torrey then held in place of the undivided interest in real estate which formerly had been Charles Torrey's, as stated in the opinion, to secure the payment to the plaintiffs, of what was found due to them upon the accounting sought in the second prayer.

The defendants severally demurred to the bill as amended. The demurrers were overruled by *Morton*, J., who, at the request of the parties and because he was of the opinion that the questions of law involved so affect the merits of the controversy that, before further proceedings, the matters ought to be determined by the full court, reported the case for that purpose, stating that, if the order overruling the demurrer was affirmed, the defendants were to plead or answer.

J. Noble, for the plaintiffs.

G. W. Anderson, for the defendants.

SHELDON, J. According to the case made by the bill, upon the decease of Edwin Bowker in 1901, the affairs of the partnership were not wound up, but the business was continued by the surviving partners, the amount which should have been liquidated and paid to the plaintiff Francis E. Bowker being left in the control and management of the surviving partners. This was done by the consent of all parties. But upon the decease of Charles Torrey it was arranged among all the parties interested, to wit, Franklin Torrey the surviving partner, the plaintiff Francis E. Bowker as executor and trustee of the deceased partner Edwin Bowker, and the defendant Adelaide J. Torrey as the executrix of the will of the deceased partner Charles Torrey, that a corporation should be formed which should take all the assets and assume all the liabilities of the partnership except the amounts due to the parties in interest, and that these should be adjusted by dividing among these parties the capital stock of the corporation, in proportion

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to their respective interests. This idea was carried out, except that they did not convey to the corporation the real estate which had been purchased by partnership funds and regarded as partnership property. They left this real estate, the legal title to which had been taken and always had stood in the name of the three partners as equal tenants in common, to be held still according to the legal title. They also by equal contribution paid $100,000 of the debts of the old firm, thereby relieving the corporation of that liability. Whether this was to compensate the corporation in part for the real estate which was not conveyed to it, does not distinctly appear. But we can of course make no intendment in favor of the bill. *Simpson* v. *Fogo*, 1 Johns. & H. 18, 23. *Foss* v. *Harbottle*, 2 Hare, 461, 502, 503. *Foreman* v. *Bigelow*, 4 Cliff. 508, 542. *Fisher* v. *Graves*, 80 Fed. Rep. 590. Disregarding this cash payment, the agreement between the parties, as modified by their voluntary action, therefore was that the corporation should take the personal assets and assume the liabilities of the firm to third parties as they then stood, and that the mutual accounts and interests of the parties should be adjusted as between themselves by making a proportionate division of the stock of the corporation. This agreement seems according to the bill to have been made openly and fairly, after such examination of the firm books and papers as the parties chose to make, without any fraud or concealment having been practised by any of them. The agreement, as modified, operated two chief results: First, that each one of the three original partners or those claiming under him should hold one undivided third of the real estate according to the legal title thereof, free from any equitable lien or claim thereon of any of the other parties in interest; and secondly, that each one of the parties should take and receive whatever was found to be the amount coming to him or her, as a partner or the representative of a partner, not in money, but in the stock of the new corporation. We find nothing in the averments of the bill to warrant us in saying that this agreement now, after the lapse of some six years, after each party has received the stock to which he or she was entitled under the agreement, after the corporation has engaged actively in business and after its stock has either become or been found to be worthless, can be avoided by the plaintiffs. It is not charged that Francis E. Bowker, who as executor and

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trustee represented all the other plaintiffs, was induced to make the agreement and the modification thereof by any fraud or deception practised upon him, or that he did not understand just what he was doing, or that what he did varied in any respect from what he intended to do. His mistake or misunderstanding as to this was simply that he did not appreciate the consequences which might result from his action. His bargain has turned out to be an improvident one, but it was made in good faith. It might have resulted advantageously. We cannot tell what or how much benefit he gained by having his undivided third interest in the real estate freed from any partnership lien or claim in behalf of the other parties, and we cannot relieve him or those whom he represented from the effect of what he chose to do. *Page* v. *Higgins*, 150 Mass. 27.

But it does not follow that the demurrer should be sustained merely because a part of the relief prayed for cannot be given. The plaintiffs cannot indeed hold anything in the nature of a lien upon Mrs. Torrey's real estate or its proceeds. But according to the bill there were errors and mistakes in stating the accounts of the different parties and carrying out the terms of the agreement, and by reason of these Mrs. Torrey received a larger amount of the capital stock of the corporation than she ought to have had, and Francis E. Bowker received a smaller amount thereof than should have come to him. That is, the bill charges that by reason of such errors and mistakes she has received stock which ought not to have been given to her, if indeed instead of receiving any stock she ought not to have paid something to the other parties. For the correction of these errors the bill can be maintained. *Moors* v. *Bigelow*, 158 Mass. 60. *Gould* v. *Emerson*, 160 Mass. 438. *Locke* v. *Locke*, 166 Mass. 435. Doubtless, under the agreement, any balance that may be found due from her she will have the right to pay in the stock which she received, to the full amount of that stock, reckoning this at its par value; *Parker* v. *Simpson*, 180 Mass. 334, 360; but we cannot know that even this may not leave something to be paid by her in money.

The bill appears to have been brought seasonably after the plaintiffs had learned of the alleged errors. And upon the face of the bill the remedy is not shown to be barred either by the general statute of limitations or by the provisions of R. L.

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c. 141, § 9. It does not now appear that the period of the latter statute has ever begun to run.

We do not see that either Franklin Torrey or the corporation was a necessary party to the bill. It may turn out that this is so, but the bill does not show it.

The demurrer is to be overruled, and the defendants are to plead or answer.

So ordered.

CHARLES H. SHERMAN, executor, *vs.* ALBERTA F. WARREN & others.

Middlesex. January 12, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Probate Court, Jurisdiction, Petition for compromise of controversy as to allowance of will.

One named as a legatee in a will offered for probate, whose legacy is revoked by the terms of a codicil offered for probate with the will, is a necessary party to a compromise of a contoversy concerning the will and codicil under R. L. c. 148, § 15; St. 1903, c. 222, and the Probate Court has no jurisdiction to authorize such a compromise against the objection of such person.

PETITION under R. L. c. 148, § 15; St. 1903, c. 222, filed in the Probate Court on August 25, 1911, for the authorization of a proposed compromise of a controversy regarding the allowance of the will and codicil of Obed C. Shepherd, late of Methuen.

In the Probate Court, the Waltham Hospital, a corporation, opposed the allowance of the petition, and it was dismissed. On appeal to this court, *Sheldon*, J., reserved the case for determination by the full court, the petition to be dismissed if the Waltham Hospital was a necessary party to the agreement for compromise; otherwise, a decree to be made as prayed for in the petition.

M. M. Johnson, (*J. R. Benton* with him,) for the petitioner.

G. L. Mayberry, for Alberta F. Warren.

C. F. French, for the Waltham Hospital.

HAMMOND, J. The only question is whether the Waltham Hospital, hereinafter called the hospital, "is a necessary party

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to the agreement for compromise." It is not an heir at law of the deceased. It is named as a legatee in the will, but in the codicil executed several months after the will there is a provision entirely revoking the legacy. If therefore both will and codicil are allowed, or if both are disallowed, the hospital gets nothing. It is for its interest that the will should be allowed and the codicil disallowed. It has not appeared to oppose the allowance of the will and codicil except as it has appeared and answered and been heard in this proceeding.

It is manifestly interested in the controversy and is a party entitled to appeal from any decree against its interest. And that is so even if it does not appear until after the decree of the Probate Court, provided the appeal be seasonably taken.

A controversy over the allowance of a will may be determined in court in two ways. The first is by the decision of the court upon a hearing and proof, allowing or disallowing the will. If allowed, it stands as written. If disallowed, it is null as though never written. The second way is by agreement of compromise signed by all parties whose interests, in the opinion of the court, will be affected by the proposed compromise, and approved by the court. When the controversy is settled in this way, the rights of the parties are determined not by the will as written, but as changed by the terms of the compromise. In these two ways, and in these only, can the rights of the parties be adjusted by the Probate Court. The jurisdiction of the court in the first way is entirely independent of any agreement of the parties. In the second way it is entirely dependent upon the agreement of the parties. The second is an anomalous proceeding. "The court has no jurisdiction unless the requirements of the statute are strictly complied with." Knowlton, J., in *Elder* v. *Adams*, 180 Mass. 303, 306.

As stated before, the interest of the hospital will be affected by the proposed agreement. Without its consent or default the hospital cannot be deprived of the right to have the validity of the codicil determined by the Probate Court upon hearing and proof. It follows that it is a necessary party to the agreement of compromise.

In accordance with the terms of the reservation the order is

Petition dismissed without prejudice.

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WILLIAM H. COGAN *vs.* ELIZABETH COGAN.

Suffolk. January 15, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Equity Pleading and Practice, Exceptions, Appeal. *Husband and Wife.*

From the allegations in a petition filed in the Supreme Judicial Court and entitled a "petition to vacate a judgment decree of the Probate Court for suitable maintenance" it appeared that the petitioner, who was the respondent in the Probate Court, had appealed from an adverse decision there to the Superior Court where he had been defaulted. In the Supreme Judicial Court, a plea in bar having been filed denying the jurisdiction of the court and, at a hearing upon the petition and the plea, no evidence whatever having been introduced, the single justice dismissed the petition. On exceptions and an appeal by the petitioner, the exceptions were overruled and the decree dismissing the petition was affirmed.

HAMMOND, J. This was a petition * filed in this court for the County of Suffolk, sitting in equity, "to set aside the pretended judgment rendered" by the Probate Court for said county in February, 1902, "and affirmed by default in [the] Superior Court . . . and all proceedings had thereunder," upon the ground that the judgment is "null and void" for want of jurisdiction over the respondent therein, who is the present petitioner. The respondent herein made no answer but pleaded in bar that this court had "no jurisdiction of the subject matter and no power to vacate the decree."

The case came on to be heard before a single justice of this court † who made a final decree dismissing the appeal, and the petitioner appealed. A motion made by the petitioner to report the evidence was denied; and the case seems to be before us upon the appeal from the final decree and upon the following bill of exceptions filed by the petitioner:

"This case came on to be heard upon petition and plea; no commissioner to take testimony was appointed or requested; no

* The petition is entitled "Petition to vacate a judgment decree of Probate Court, Suffolk County, for suitable maintenance."

† *Morton*, J.

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witness was sworn; no oral or documentary evidence was introduced; the petitioner read parts of what he said was a decree of the Probate Court and also what purported to be a return of a sheriff, but such decree and return were not submitted to opposing counsel nor to the court. The petitioner in argument referred the court to several citations: R. L. c. 159, § 29; St. 1859, c. 237, § 11; *Pingree* v. *Coffin*, 12 Cush. 600. After such hearing, on February 15, 1911, a final decree was entered dismissing said petition. On September 22, 1911, the petitioner filed in the clerk's office an appeal from this decree; on September 29, 1911, the petitioner filed in the clerk's office a petition asking that the 'oral testimony may be reported to the full court;' hearing was had upon said petition, and on September 29, 1911, the court denied the petition and the petitioner excepted and prays that his exception may be allowed."

Although this bill of exceptions was signed by the petitioner "under protest," still it is the only one before us. Upon this bill it appears that at the hearing no evidence was offered in support of the petition. The decree dismissing the petition was therefore right, and for the same reason if for no other the motion to report the evidence was rightly overruled. It is unnecessary to consider any other defense to the petition.

Exceptions overruled; decree affirmed.

W. H. Cogan, pro se.

No counsel appeared for the respondent.

HENRY F. SPENCER, trustee, *vs.* CATHERINE S. ADAMS & others, executors & trustees, & others.

Suffolk. January 15, 16, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Trust, Construction. *Devise and Legacy. Words*, "My surviving children," "Between," "All this property."

A testator, who at the age of seventy-five years wrote his will with his own hand, evidently intended to divide his property after the death of his wife, who was of about his age, so that, taking into account gifts which he previously had made

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to some of his children and losses which he had sustained through the improvidence of a son, the result of the division would be as nearly equal as possible. One article of the will began "After my deceas" and provided that certain real estate should be held in trust for the improvident son during his life, and "at his deth all this property is to be equally devided between my surviving children" and the son's daughter. *Held*, that by the words "my surviving children" the testator meant his children surviving at his death, and by the word "between" he meant "among," and that the words "all this property" included accumulated income; so that, after the death of the son, the property and accumulated income should be divided equally *per capita* among those of the testator's children, except the son, who were surviving at the testator's death and the daughter of the son and their heirs and assigns.

PETITION, filed in the Supreme Judicial Court on September 27, 1910, by the trustee under the will of Jesse Holbrook, late of Boston, for instructions as to the construction of the seventh article of that will.

From the pleadings and an agreed statement of facts the following facts appeared:

By the first article of his will the testator provided for the care of a burial lot. In the second article he gave a diamond breast pin to his son Charles B. Holbrook and by the third article a diamond finger ring to his daughter Catherine S. Adams. The fourth article contained a legacy to a children's home. The fifth article gave to his wife the furnishings of his dwelling house and the income and management of all his property, real and personal, for her life.

By the sixth article it was provided that after the death of the testator's wife $10,000 should be given to each of his daughters Catherine S. Adams, Sarah D. Spencer and Flora A. Sawyer, and $7,000 to his daughter Mary Y. Clark, and $5,000 and the homestead were placed in trust for the testator's daughter Fanny H. Willis and her daughter Mary Jesse Willis after her death.

The seventh article is quoted in the opinion.

The eighth article was as follows: "All the rest and residue of my estate bouth real and personal property I give to my daughters Catherine S. Adams, Mary Y. Clark, Sarah D. Spencer, Fannie H. Willis and Flora A. Sawyer; Fannie H. Willis share in Trust to be paid to her as said trustee thinks advisable."

The testator wrote the will with his own hand in 1888 when he was seventy-five years old. He had had seven children, six of

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whom, five daughters and a son, then were living. He died the next year leaving surviving him a wife about six months younger than himself and his six children. His wife died two and a half years later leaving the same six children surviving.

Some years before his death the testator had given his daughter Mary Y. Clark a house worth $3,000.

From June 1, 1866, to September 12, 1870, Charles B. Holbrook borrowed money of his father, Jesse Holbrook, to the amount of $25,137.03, and gave his notes therefor. The largest of these notes was for $19,539.70 and was dated June 1, 1866, and the interest thereon was paid up to January 1, 1870. The other notes were for various smaller amounts and no interest was ever paid on them. In 1871 Jesse Holbrook obtained a judgment against Charles B. Holbrook for the amount of the above indebtedness, and in the same year Charles B. Holbrook conveyed to Jesse Holbrook the land at Gray's Ferry road in Philadelphia in the State of Pennsylvania, which was then owned by Charles B. Holbrook. This conveyance was on account of the above indebtedness, and the consideration named in the deed was $21,000. The land was then vacant, and Jesse Holbrook soon afterwards built thirty-six houses on it, and Charles B. Holbrook for several years thereafter looked after this property and collected the rents, receiving compensation therefor. In September, 1872, Jesse Holbrook acquired other vacant land in Philadelphia in the State of Pennsylvania, in part payment of his son's indebtedness, the consideration recited in the deed being $4,850. After the year 1884, Jesse Holbrook employed one of his tenants in Philadelphia to look after the property and to collect the rents, because of dissatisfaction with the manner in which Charles B. Holbrook handled the property and his carelessness in regard to accounts. The above described land and the houses thereafter built thereon formed at the time of the making of the will of Jesse Holbrook and at the time of his death the trust fund which is the subject matter of this action. The notes above referred to signed by Charles B. Holbrook never were surrendered by Jesse Holbrook, but remained in his possession, without any indorsement other than the interest above stated, down to the time of his death. He never made any effort to collect them and never made any demand for their payment.

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Mary Y. Clark died in 1898 and Frances H. Willis (called "Fanny" in the will) died in 1909. Charles B. Holbrook died in 1910.

Other material facts are stated in the opinion.

The case was reserved by *DeCourcy*, J., upon the pleadings and agreed facts for determination by the full court.

F. W. Kaan, for Catherine S. Adams and others.

G. A. O. Ernst, (*L. K. Clark* with him,) for Louise B. Bigelow and others.

J. P. Richardson, for Florence W. Holbrook.

C. P. Lincoln, for Henry R. Sawyer, administrator of the estate of Walter S. Sawyer.

MORTON, J. This is a petition by the trustee under the will of Jesse Holbrook, late of Boston, for instructions as to the construction of "Article Seventh" of said will, which is as follows:

"After my deceas, I give in Trust to Henry F. Spencer all the property I own at Grayes Ferrey Road in the City of Philadelphia, Eighteen Houses on Oakford Street and Eleven houses on Latona Street and Seven Houses on Thirty first Street and all the vacant Land adjoining said Estates, with power to sell any and all of the property as he may think best and reinvest the funds in good securities. After all the bills for repairs and taxes are paid, said Trustee, will pay to my son Charles B. Holbrook out of the rents the sum of one hundred dollars per month during his life, and not to any one else, at his deth all this property is to be equally devided between my surviving children & his daughter Florance W. Holbrook." The will was drawn by the testator himself. Charles Holbrook has died and the questions are, whom did the testator mean by the words "my surviving children," and is the property to be distributed *per capita* between the surviving children and Florence or one half to the surviving children and the other half to Florence. There is also a question as to the division of income which has accumulated from the trust estate.

We are of opinion that by "my surviving children" is meant children surviving at the testator's death. That the testator had his own death in mind as the time to which the survivorship related is shown, we think, by the words "after my deceas" with

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which the article begins. That distinguishes this case from *Coveny* v. *McLaughlin*, 148 Mass. 576, relied on by the children who survived at the death of Charles. A construction which limited the surviving children to those living at the death of Charles would cut off the children of those who died before Charles and would interfere with the scheme of general equality amongst his children which the testator evidently intended and which he was at some pains to work out in the previous article of the will, as appears when that article is considered in connection with the agreed facts. If the testator's death is the point of time, as we think it is, as of which the survivorship is to be determined, then taking the words "my surviving children" literally, Charles would be included. But we think that the more reasonable construction is that the testator intended to limit his bounty so far as Charles was concerned to the provision which he made for him during his life, and to give to Charles's daughter, who was his only surviving child, the share which Charles otherwise would have had in the remainder. As to Charles there was a reason for this, as shown by the agreed facts, in the manner in which he had managed the Philadelphia property, and as to the daughter, the testator may well have deemed that he was carrying out in the main his scheme of equality by putting her in her father's place in the final division.

We see nothing in the will or in the agreed facts to warrant the construction that in the final division one half is to go to the surviving children and the other half to Florence Holbrook. The words "my surviving children" include all the children who survive, and signify and describe in connection with the words "and Florence Holbrook" those amongst whom the division is to be made. Florence Holbrook shares with the surviving children and in a sense as one of them. A construction which would give her one half and the surviving children the other half would do violence to the testator's manifest intention to divide his property equally. There is no significance in the fact that the word "between" is used and not "amongst." As used here "between" has the sense of "amongst."

The words "all this property" in the article include the property with its accumulations.

The result is that the property is to be conveyed to and divided

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equally amongst the testator's children, except Charles, who were living at the testator's death and Florence Holbrook, *per capita*, and their heirs and assigns.

Decree accordingly.

COMMONWEALTH *vs.* JAMES HAYDEN.

Middlesex. January 16, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Municipal Corporations, By-laws and ordinances. *Statute*, Construction. *Words*, "Construction," "Alteration."

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R. L. c. 104, § 1, providing that any city, except Boston, which has accepted the provisions of that section, for the prevention of fire may "regulate the inspection, materials, construction, alteration and use of buildings," and may prescribe penalties not exceeding $100 for each violation of such regulation, does not authorize such a city to pass an ordinance regulating the repairing of roofs and imposing a maximum penalty of $100 for its violation.

RUGG, C. J. The defendant was convicted * upon a complaint which charged him with the violation of an ordinance of the city of Somerville, in that he replaced upon a certain roof old shingles with new, without otherwise changing the roof. The ordinance was as follows: "Whenever a roof covering, other than non-combustible, is hereafter replaced in whole or in part, the new roof covering shall be non-combustible to the satisfaction of said inspector, if as much as one third of the superficial area of the entire roof is replaced." The maximum penalty for violation of the ordinance was $100. It is plain that the ordinance was framed not under the general power of the city to enact ordinances, where the largest penalty authorized for an infraction is $20, but under the authority assumed to be conferred by R. L. c. 104, § 1, which had been accepted by the city of Somerville. The primary question is whether it can be sustained under this statute. The material portion of the

* At a trial before *Hardy*, J. The case was submitted on an agreed statement of facts and the jury returned a verdict of guilty. The defendant alleged exceptions.

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statute is that any city, except Boston, for the prevention of fire, may "regulate the inspection, materials, construction, alteration and use of buildings" and may prescribe penalties not exceeding $100 for each violation of such regulation. This statute is a constitutional exercise of the police power. *Salem* v. *Maynes*, 123 Mass. 372.

The re-shingling of a roof theretofore shingled does not come within the enumeration of purposes set forth in this section of the statute. Re-shingling is simply a repair of an existing structure. It is not a "construction." This word in the connection in which it occurs means the erection of a new building or an addition to an old building. "Alteration" denotes a change or substitution in a substantial particular of one part of a building for a building different in that particular. See *Bigelow* v. *Worcester*, 169 Mass. 390. "Use" indicates the purposes for which the building may be occupied. "Materials" is a word of general signification, and must be interpreted as ancillary to the other more definite terms employed in the statute. It does not extend the scope of the act beyond the subjects otherwise designated. It refers to the materials to be employed in the construction and alteration of buildings. There is no word in this section of the statute which, properly construed with its collocation, comprehends repairs upon buildings. A legislative enactment of this kind, being penal in nature and in derogation of common right, is not to be enlarged beyond its plain import, and as a general rule is strictly construed. *Newton* v. *Belger*, 143 Mass. 598. *Commonwealth* v. *Maletsky*, 203 Mass. 241. *Winthrop* v. *New England Chocolate Co.* 180 Mass. 464.

This construction is confirmed by the terms of § 10 of the same chapter 104. This section confers jurisdiction in equity to restrain the "construction, alteration, maintenance or use of a building" in violation of an ordinance (thus repeating three of the words used in § 1), and also "the further construction, alteration or repair of a building," condemned as unsafe by a board of survey appointed under § 6. The omission of the word "repair" from one section and its use in another of a single statute regulating the same subject cannot be regarded as devoid of significance. The owner of a building which is unsafe might well be denied the right of repair, when the same right would not be withheld from the owner of a building sound and capable of prolonged

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use with suitable repairs. The Legislature may have thought that a repair of an existing building would not increase its liability to spread fire while unregulated construction or alteration of buildings might add materially to fire risk. The language of R. L. c. 104, § 1, does not go to the extent of authorizing a city by ordinance to regulate a simple repair of an existing building. It follows that a verdict of not guilty should have been directed.

Exceptions sustained.

W. H. Best, for the defendant.
J. J. Higgins, District Attorney, for the Commonwealth.

ETTA MALLEN *vs.* JAMES A. HOUSTON COMPANY.

Suffolk. January 16, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence. Snow and Ice.

If a woman, who is walking on the sidewalk of a city street on a stormy morning when there has been a snow fall of about eight inches, sees a mass of snow and ice fall on the sidewalk in front of her, pauses a moment, steps back and then, receiving no warning by rope, guard or otherwise, proceeds on her course and is struck and injured by a mass of snow thrown from the roof of the adjoining building by a servant of the occupant of the building, she is not negligent as matter of law, and, in an action against such occupant for her injuries, the question of her due care is to be determined by the jury in the light of all the attendant conditions.

St. 1908, c. 305, providing that certain sections of the highway act, in so far as they relate to notices of injuries resulting from snow or ice, "shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such defective condition is caused by, or consists in part of, snow or ice," has no application to an action against the occupant of a building for injuries caused by snow negligently thrown from the roof of such building by a servant of such occupant.

TORT, against a corporation occupying and using for its business a building on the corner of Washington Street and Temple Place in Boston, for personal injuries sustained by the plaintiff on January 15, 1910, shortly after eight o'clock in the morning, when the

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plaintiff was walking on the sidewalk of Washington Street adjoining such building, from being struck by a mass of snow and ice alleged to have been negligently thrown by the servants and agents of the defendant from the top or from near the top of such building. Writ dated March 25, 1910.

In the Superior Court the case was tried before *Dana*, J. The defendant admitted that it was in charge and control of the premises on the day of the accident, and that the person who removed the snow and ice from the roof and the ledge of the building was working in its employ on that day. The material facts which could have been found upon the evidence are stated in the opinion.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence and the pleadings in the case the plaintiff was not entitled to recover, urging among other grounds that the plaintiff had failed to prove notice by the plaintiff to the defendant, as required by law where snow or ice is involved.

The judge refused to make this ruling and submitted the case to the jury. At the request of the defendant two special questions also were submitted to the jury, which with the answers to them were as follows:

"1. Was Etta Mallen (the plaintiff in this action) struck by snow or ice or both while on the sidewalk on Washington Street in front of the defendant's store, and if so, was it snow or ice or both which fell from the defendant's building without actually being thrown down by any person working for the defendant? Answer Yes or No." The jury answered "No."

"2. Was Etta Mallen struck by snow or ice or both while on the sidewalk on Washington Street in front of the defendant's store, and if so, was it snow or ice or both which was thrown from the defendant's building by some person working for the defendant? Answer Yes or No." The jury answered "Yes."

The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

St. 1908, c. 305, is as follows: "The provisions of sections twenty, twenty-one and twenty-two of chapter fifty-one of the Revised Laws, in so far as they relate to notices of injuries resulting from snow or ice, shall apply to actions against persons or corporations founded upon the defective condition of the premises of such persons or corporations, or of an adjoining way, whenever such de-

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fective condition is caused by, or consists in part of, snow or ice. Leaving the notice with the occupant of said premises, or, in case there is no occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions."

The case was submitted on briefs.

M. O. Garner & J. W. Britton, for the defendant.

E. L. McManus, G. H. Lucey & J. F. Barry, for the plaintiff.

RUGG, C. J. There was evidence from which it might have been found that the plaintiff, while on the sidewalk of Washington Street in Boston, was struck by snow thrown from the defendant's building by one of its employees while removing an accumulation occasioned by a snow storm.

The defendant urges that the plaintiff is precluded from recovery because she was not in the exercise of due care. This defense is based on the facts that the accident happened on a stormy morning, when there had been a snow fall of about eight inches, and that the plaintiff after seeing a mass of snow and ice fall on the sidewalk in front of her paused a moment, stepped back and then continued on her course without doing anything for her protection, and was injured. There was evidence that no warning by rope, guard or otherwise was upon the sidewalk. She was a traveller upon a public way, and was not bound to anticipate danger in going forward, even under the circumstances here disclosed. It cannot be ruled as matter of law that the ordinarily prudent person must expect another fall of a mass of snow upon the sidewalk because there has been one such fall. The circumstance that this came from the negligence of the defendant's servants was significant as bearing upon a reasonable probability that it would be repeated. The due care of the plaintiff was to be determined as a fact in the light of all the attendant conditions. *Linnehan* v. *Sampson*, 126 Mass. 506. *Dipper* v. *Milford*, 167 Mass. 555. *Frost* v. *McCarthy*, 200 Mass. 445, and cases there collected.

The defendant further contends that as the plaintiff gave no notice to the defendant of her injury within ten days after it was received, she is precluded from recovery by St. 1908, c. 305. This statute requires the notice set forth in R. L. c. 51, §§ 20–22, when an action is founded upon a defective condition of premises or an adjacent way caused by or consisting in part of snow or ice.

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O'Donoughue v. *Moors*, 208 Mass. 473. *Baird* v. *Baptist Society*, 208 Mass. 29. *Paszkowski* v. *Stony Brook Paper Co.* 210 Mass. 86. There was no evidence tending to show that the plaintiff was injured by any defective condition either of the premises of the defendant or of the adjacent way. Her only contention was that she was struck by snow and ice tortiously thrown by the agent of the defendant in the course of his employment. This was not a condition but conduct. It is as if the defendant itself carelessly threw a snowball or a piece of ice by which she was injured. She grounded her case upon an intentional, intelligent and voluntary act of a human being, and not upon a passive condition or something set in motion by the forces of nature. The statute does not apply to such a situation as that here disclosed.

Exceptions overruled.

FRANK HANSON *vs.* GEORGE INNIS & others.

Middlesex. January 16, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Unlawful Interference. Strike. Labor Union. Equity Pleading and Practice, Parties. *Equity Jurisdiction,* To enjoin unlawful strike, Damages.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff as the foreman of a granite company, if it appears that the defendants instituted and continued an unlawful strike which compelled the superintendent of the granite company as a last resort to agree to leave the question whether he should discharge the plaintiff to a vote of the workmen at the quarry and that upon a majority of such workmen voting against the retention of the plaintiff the superintendent discharged him, the plaintiff is entitled to relief against the defendants who instituted and maintained the strike and not merely against those workmen who voted at the quarry for his discharge.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff as the foreman of a granite company, if it appears that unlawful acts of the defendants caused the discharge of the plaintiff and made it impossible for him to procure other employment, the plaintiff is entitled to recover damages not only for the loss of wages due to his discharge but also, once for all, for his present and prospective inability to procure employment, which may continue for an indefinite time, caused by the unlawful acts of the defendants.

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BILL IN EQUITY, filed in the Supreme Judicial Court on August 27, 1909, against officers and members of the Milford Branch of the Quarry Workers International Union of North America and of the Milford Branch No. 88 of the Derrickmens International Union of North America, voluntary unincorporated associations, seeking relief by way of injunction and damages for causing the discharge of the plaintiff in May, 1909, as foreman of the Massachusetts Pink Granite Company, a corporation doing business in Milford.

The case was referred to Arthur P. Hardy, Esquire, as master. The following facts, among others, appeared by his report. In February, 1909, one Perry, who was the superintendent of the granite company, employed the plaintiff under an oral agreement as foreman of that company at $21 a week. He was to continue in charge of the quarry until a contract for cutting the stone for the John Hancock Building in Boston had been completed and thereafter as long as there was work to be done. The defendants Dacey and Mahoney applied for work under the plaintiff but were refused because there were no vacancies. On motion of the defendant Dacey a vote was passed by the quarry workers' union that the plaintiff be required to join that union and that his initiation fee be fixed at $50, the usual fee being $1.50. The plaintiff did not make application to join the union, and Perry was notified of a vote of the union that its members should not work under the plaintiff as foreman. The plaintiff was not discharged at that time, and the next day the defendants in the employ of the granite company refused to work, and a strike was begun which continued about ten days, during which Perry made unsuccessful attempts to induce the striking defendants to resume work. Finally Perry proposed that all the men working for the granite company should take a vote at the quarry and that he should abide by the decision of the majority. Such a vote was taken by ballot at the quarry with the result that fourteen workmen voted for the plaintiff and sixteen against him, whereupon Perry notified the plaintiff that the vote had gone against him and that he could retain him no longer in the employ of the company.

The master made the following findings: "I find that the purpose of the strike was to compel the discharge of Hanson [the plaintiff] as foreman, not because of his treatment of the men working under him or because he was otherwise incompetent to act as

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foreman. In my opinion it was instituted simply and solely because of the influence which Dacey had over the men working for the Massachusetts Pink Granite Company, and he exerted this influence to advance his private interests in an attempt to secure redress for what he considered was unfair treatment on the part of Hanson." In a supplemental report the master found that "Hanson as a foreman was entirely satisfactory to Perry and he desired to retain him in the employ of the company in that capacity," and "that the vote proposed by Perry was taken as a result of coercion imposed upon him by the unions and the defendants by instituting and continuing the strike."

Soon after his discharge the plaintiff was employed again by the granite company but not in the capacity of foreman or quarryman and his employment lasted for only four days. The plaintiff attempted to secure work at other quarries in Milford and elsewhere but in each instance was refused work because he was unable to give an affirmative answer to the question as to whether or not he had effected a settlement with the union. The master found that the plaintiff by reason of his discharge lost as wages to the time that the quarry was shut down in December, 1909, the sum of $588, and that he was deprived by the action of the defendants and other members of the union from securing employment elsewhere. He also found as follows: "It is a fair inference from the evidence introduced that this inability to secure employment as a journeyman quarryman will continue indefinitely or until such time as the complainant becomes a member of the union; also that his inability to secure employment as a foreman in the trade or calling in which he is skilled and the only one for which his experience and training fit him will continue indefinitely. If the court rule that the complainant is entitled to recover damages, then I find and rule that he is entitled to damages in the sum of $2,000, including loss of wages as above stated."

The defendants' exceptions to the master's original report were as follows:

"1. Because it appears by the report that the plaintiff was discharged from the quarry by Mr. Perry as the result of a vote taken by secret ballot by men working at the quarry, which vote the plaintiff was cognizant of, apparently acquiesced in, and made no objection to until he found that the vote was against him. On this

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state of facts the defendants asked the master to rule that the plaintiff was estopped from bringing any action against the defendants by reason of his own participation and apparent acquiescence in the vote, but the master declined to so rule.

"2. Because the master in assessing damages for the plaintiff has not confined himself to actual damage, but has allowed the plaintiff damages based upon apprehension of inability on the part of the plaintiff to secure work in the future; and because damages over and above the amount actually shown to be lost in wages less the amount that he had earned has been allowed by the master.

"3. It appears that the plaintiff when he became foreman took a formal withdrawal card from the union [not one of those represented by the defendants] but it does not appear that he severed his connection therewith, neither did he appeal to the local branch or any officer or body connected with the organization for relief. On this state of facts the defendants asked the master to rule that the plaintiff should have exhausted the remedies provided in the constitution of the union to which he belonged before applying to the courts for relief and objection is taken to the master's refusal so to rule.

"4. It appears that it was the vote of sixteen workmen employed at the quarry which caused Hanson to be discharged by Perry and the defendants asked the master to rule that these sixteen individuals alone, if any, should be held as defendants and because the master refused so to rule.

"5. Since the strike was directed against the Massachusetts Pink Granite Company and it is not a party to the plaintiff's bill, it is immaterial whether the strike is justifiable or not, and objection is taken to the master's report because he refused to so rule."

The defendants' exceptions to the master's supplemental report were as follows:

"1. Because it is against the evidence.

"2. Because it is against the weight of the evidence.

"3. Because a fair construction and interpretation of the evidence upon which said supplemental report is based does not justify the findings therein contained.

"4. Because the findings arrived at therein by the master are

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inconsistent with the statements of fact contained therein upon which the master bases said findings."

The case came on to be heard before *Morton*, J., who reserved it for determination by the full court upon the pleadings, the master's report, the master's supplemental report, and the exceptions of the defendants.

C. L. Newton, for the plaintiff.

F. W. Mansfield, for the defendants.

SHELDON, J. None of the exceptions taken by the defendants to the master's original report can be sustained.

The plaintiff never had agreed to abide by the result of the vote taken at Perry's suggestion, and had had nothing to do with causing it to be taken. There is no ground for the contention that he was estopped by any participation or apparent acquiescence therein from bringing his action against the defendants.

The plaintiff was not a member of either of the labor unions named in the bill and was not bound by any of their rules. He was not obliged to seek relief in their tribunals, but could resort to the courts to obtain redress for any wrong done to him by them. That he had been a member of another different labor union is not material.

On the facts found by the master, the plaintiff's discharge and his inability to obtain other work were caused by the unlawful acts of the defendants. *Berry* v. *Donovan*, 188 Mass. 353. Perry acted under their compulsion. Of course the strike intended to obtain this unlawful end was unjustifiable; and it was material to show that the injury done to the plaintiff had been procured by unlawful means. The remedy accordingly was against the defendants, and not merely against the sixteen men who had voted against the retention of the plaintiff.

The plaintiff is entitled in this suit to recover once for all his entire damages sustained from the unlawful acts of the defendants in procuring his discharge and making it impossible for him to procure other employment. *De Minico* v. *Craig*, 207 Mass. 593, 600.

The findings in the master's supplemental report are not inconsistent with the facts upon which they are based. The other exceptions thereto depend upon the evidence, which has not been reported, and so none of them can be sustained.

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Upon the facts reported by the master the plaintiff is entitled to a decree for damages for the sum of $2,000. *Berry* v. *Donovan*, 188 Mass. 353. *Pickett* v. *Walsh*, 192 Mass. 572. *De Minico* v. *Craig*, 207 Mass. 593. *Folsom* v. *Lewis*, 208 Mass. 336. This gives him full damages, past and future. As he has asked for damages for all time, and at the argument did not ask for an injunction, it is not necessary now to discuss that matter.

Decree accordingly.

WILLIAM J. BARRY *vs.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Suffolk. January 16, 17, 1912. — February 29, 1912.

Present: MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Loan. Bills and Notes, Delivery. *Agency. Equity Jurisdiction,* Fraud.

Where a lender of money has received the note of an applicant for a loan, and sends to an agent for delivery to the applicant a check payable to the applicant for the amount of the loan, and the agent takes the check to the applicant and, holding it face downward, fraudulently induces the applicant to indorse it under the belief that he is signing a voucher, and the agent cashes the check and absconds with the proceeds, the possession of the check never has passed to the applicant.

The holder of an endowment policy applied to the insurance company which issued it for a loan upon the security of his policy, and delivered to the company his policy and his note for the amount of the desired loan. The insurance company sent to one of its agents for soliciting insurance a letter addressed to the applicant for the loan, requesting a receipt and enclosing a check payable to such applicant for the amount of the loan applied for. The insurance company authorized the agent to deliver its letter and the check and "also to attend to certain other matters in connection with the delivery of the check." The agent took the check to the applicant and, holding it face downward, fraudulently induced the applicant to indorse it under the belief that he was signing a necessary voucher. The agent then cashed the check and absconded with the money. In a suit in equity by the applicant for the loan, seeking the return of his policy and the cancellation of his note, it was *held*, that it might be found to have been within the scope of the agent's special authority to take a receipt or voucher for the papers which he was to deliver and therefore that it was within the apparent scope of his authority to demand that the applicant should sign some voucher, and that on the evidence presented it could be found that the plaintiff was not guilty of such negligence as to bar him from recovery.

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BILL IN EQUITY, filed in the Supreme Judicial Court as amended by a substitute bill on October 27, 1911, praying for an order for the return to the plaintiff of an endowment policy of life insurance for $5,000 issued to the plaintiff by the defendant and also for the return and cancellation of a note for $800 signed by the plaintiff, on which, with the policy as security, the defendant had agreed to lend that sum of money to the plaintiff.

The fourth paragraph of the bill alleged that the defendant had neglected and refused to pay or deliver to the plaintiff the sum of $770 or any part thereof.

The defendant's answer denied the allegations of the fourth paragraph of the bill and alleged that it had paid to the plaintiff the sum of $770 referred to and that it was entitled to retain the policy and the note.

The case was heard by *Morton*, J. Among other facts there was evidence of the following: On May 1, 1911, the plaintiff had applied to the defendant for a loan upon his policy. He gave the note in question and his policy to the defendant's loan clerk, who said to him, "You will hear from us in about a week." On the morning of Saturday, May 6, 1911, when the plaintiff was busy at his office at Waltham, he was called upon there by one Phinney, a soliciting agent of the defendant.

The defendant had sent by mail to Phinney a check for $770 payable to the plaintiff's order representing the amount of the loan with interest discounted. There was sent with it a letter addressed to the plaintiff requesting a receipt. The plaintiff testified in regard to his interview with Phinney as follows: "Mr. Phinney, an agent of the Mutual Life Insurance Company, came into my office, and stated that — I said to him — in the course of my talk I said, 'What can I do for you?' — he was ushered into the private office, — and he said, 'I am Mr. Phinney of the Mutual Life of New York.' He said, 'You made an application for a loan from the company on your policy?' I said, 'Yes.' And he said, 'I brought out a voucher for you to sign.' And I said, 'All right.' And he pulled out the slide part of the desk, the leaf, and laid it right down there, and held it in his hand, with his four fingers on the four corners, and I signed it where he indicated, and then he says, 'I will bring you the check in two or three days, either Tuesday afternoon or Wednesday morning.' I said, 'All right, sir.'"

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The plaintiff testified that he believed he was signing a voucher, that he had no reason to doubt the honesty of Phinney and that he "never dreamed but what" he was signing a voucher. The paper which Phinney held face downward for the plaintiff to sign was the check for $770. On leaving the plaintiff, Phinney immediately cashed the check and absconded with the money.

The justice made a memorandum of decision as follows:

"I do not think that the loss in this case should fall on the plaintiff. To begin with, Phinney was the defendant's agent, not Barry's. The check, though in a sealed envelope directed to Barry, was entrusted by the defendant to Phinney, to be delivered by him to the plaintiff. He was also to attend to certain other matters in connection with the delivery of the check. He did not deliver the check to the plaintiff, but, by means of a fraud practised upon him, converted the check and its proceeds to his own use. I do not think that what took place constituted a delivery of the check to the plaintiff, and I so find. The check never having been delivered to the plaintiff, the loss arising from Phinney's fraud should be borne by the defendant, unless the plaintiff's negligence, assuming that he was negligent, bars him from relief. I do not think that it does. If there was any negligence on his part, it was induced by Phinney's fraud while acting, as it seems to me, and as I find, within the apparent scope of his authority, and the defendant cannot, therefore, I think, set up the plaintiff's negligence in bar of his claim to relief. I find, if that is material, that the plaintiff was not culpably negligent in relying upon Phinney's representations. What Phinney did was not within the apparent scope of his authority as an agent for soliciting insurance. But the defendant reposed special confidence and authority in him in connection with the delivery of the check, and it is therefore immaterial that what he said and did was not within the apparent scope of his authority as an agent for soliciting insurance. I find that what purports to be the plaintiff's indorsement on the back of the check was procured by Phinney's fraudulent representations that what the plaintiff was writing his name upon was a voucher, and that the plaintiff did not know or believe, and had no reason to know or believe, was a check for the amount due him on the loan or for any other purpose, but believed that, according to Phinney's representations, it was some sort of a voucher required of him by the

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company, preliminary to issuing a check for the amount coming to him on the loan. I think that there should be a decree for the plaintiff."

By order of the justice a final decree was entered ordering that the policy be returned to the plaintiff and that the note be delivered up to the plaintiff to be cancelled, and that the plaintiff recover costs in a sum named. The defendant appealed, the evidence being reported by a commissioner appointed under Chancery Rule 35.

W. D. Turner, for the defendant.

F. D. Putnam, for the plaintiff.

SHELDON, J. The only issues of fact raised by the defendant's answer are by its denial of the fourth paragraph of the bill and its averment that it has paid to the plaintiff the amount which it had agreed to lend to him. These issues have been decided adversely to the defendant, and we should not be justified in reversing the findings made by the single justice. We cannot say that the plaintiff's testimony is not to be believed, and on that testimony the possession of the check never passed from Phinney to the plaintiff. *Markey* v. *Mutual Benefit Life Ins. Co.* 103 Mass. 78, 79.

The only remaining question is whether on these findings the plaintiff is entitled to the relief asked for. Phinney was the defendant's agent to deliver its letter and check to the plaintiff. This was to be sure a limited agency; but within its apparent scope, though no further, the case stood as if it had been the defendant itself, acting through its most general agent, that had undertaken to make the delivery. Phinney might well have been authorized by the defendant to take a receipt or voucher for the papers which he was to deliver. The defendant plainly did not intend that the plaintiff should receive its check until the defendant should have received from him whatever paper it required to show the nature of the transaction and the security it was to have for the proposed loan. It did not even start Phinney on his way to the plaintiff until it had received the plaintiff's note and policy. It was for the defendant to say what further receipt or voucher it would require. It was therefore within the apparent scope of Phinney's authority to demand that the plaintiff should sign some voucher. And this was found as a fact at the hearing. The single justice found, and on the testimony of the manager of the defendant's Boston agency

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he was well warranted in finding, that Phinney "was also to attend to certain other matters in connection with the delivery of the check." This means, as the testimony clearly shows, that Phinney was expected to procure the plaintiff's receipt or acknowledgment and send it to the defendant.

The finding that this "was not within the apparent scope of his authority as an agent for soliciting insurance" does not help the defendant. It was not in the latter capacity that he either was or purported to be acting, or that he was authorized by the defendant to act in this matter.

It may be that the single justice could have found that the plaintiff was guilty of such negligence as to bar him from recovery. But he manifestly was not bound so to find. And upon Barry's testimony as to the transaction and the circumstances under which he indorsed the check, thinking that he was signing a voucher, the finding is not shown to be wrong. We have held in many cases that one who has signed a release or other paper under a fraudulent misrepresentation as to its contents or effect may avoid his agreement therein contained when it appears also that he was kept in ignorance of its contents by some fraudulent concealment or artifice. That was the case here. *Curley* v. *Harris*, 11 Allen, 112. *Leddy* v. *Barney*, 139 Mass. 394. *O'Donnell* v. *Clinton*, 145 Mass. 461. *Rosenberg* v. *Doe*, 148 Mass. 560. *Freedley* v. *French*, 154 Mass. 339. *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447. *McNamara* v. *Boston Elevated Railway*, 197 Mass. 383. *Price* v. *Rosenberg*, 200 Mass. 36. *Rollins* v. *Quimby*, 200 Mass. 162. *Larsson* v. *Metropolitan Stock Exchange*, 200 Mass. 367.

The final decree must be modified so as to include the costs of the appeal, and so modified must be affirmed.

So ordered.

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ARIOCH W. ERICKSON *vs.* GEORGE B. H. MACOMBER COMPANY.

Suffolk. January 17, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Contract, Construction, Performance and breach, Building contract. *Practice, Civil,* Ordering verdict. *Waiver.*

The plan for a stable contemplated the keeping of horses on the third or stall room floor and the storage of carriages on the second floor immediately beneath it. A contract in writing for the building of the stable contained carefully stated specifications, as to the materials for and the manner of laying the stall room floor, which were intended by the owner to result in making that floor water-tight, and it was provided that the asphalt of the floor, laid in the manner required, was "to be guaranteed and kept in repair for two years," but the contract and specifications contained no provision that the floor should be water-tight. *Held,* that the construction of the contract and specifications was a question of law for the court, and that the contractor could not be held to guarantee that the mode of construction required of him would produce a water-tight floor.

In an action by the owner of a stable, constructed by the defendant under a contract in writing with the plaintiff and paid for in full by the plaintiff, for alleged improper performance of the contract, the jury in answer to special questions found that the driving of nails by the defendant through the asphalt covering of the stall room floor of the stable was a negligent and improper way of complying with the specifications of the contract and caused a leak which damaged property of the plaintiff to an amount named. The judge ordered a verdict for the plaintiff, and reported the case for determination by this court with a stipulation that, if the ordering of the verdict was wrong, judgment was to be entered for the defendant. It was assumed by this court that there was evidence warranting these special findings; but it appeared that no specific manner of fastening the stall room floor was provided for in the specifications, that the defendant had agreed to perform his work to the satisfaction of the plaintiff's architect and that the payments were to be made upon certificates of the architect. There was evidence on which the jury could have found that the method of doing the work by driving the nails through the asphalt had been approved by the architect and that on his approval the work had been accepted by the plaintiff, so that any objection on this ground had been waived by him. This issue was not submitted to the jury and they did not pass upon it in any of their findings. *Held,* that the special findings of the jury, which did not cover the whole case, were not sufficient to warrant the ordering of the verdict for the plaintiff, and that under the terms of the report judgment must be entered for the defendant.

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CONTRACT for alleged breaches of a contract for the building of a stable on Brimmer Street in Boston. Writ dated November 1, 1908.

The plaintiff's declaration contained three counts. The first count alleged that the defendant wholly failed to construct the stall room floor of the stable according to the specifications, in that it did not cover the entire area of the stall room floor one inch thick with Warren's Kiola Asphalt Floor, nor put the same down in the best manner, nor underlay the same with two layers of best roofing paper acceptable to the architects. The third count alleged that the defendant guaranteed the floor for two years, but refused to perform its guaranty.

The second count was as follows:

"The plaintiff says that on or about March 22, 1906, he made a contract in writing with the defendant, whereby the defendant undertook in consideration of certain payments to be made by the plaintiff, to build a stable upon land at the corner of Brimmer, Chestnut and Byron streets, Boston, owned by the plaintiff, in a skilful and workmanlike manner, according to drawings and specifications incorporated in said contract. A copy of said contract and such of said drawings and specifications as are material to the issues raised in this action are annexed hereto and made a part of this declaration. In order that the floor of the stall room in said stable should be water-tight, and to prevent the leakage of drainage through the same, it was provided in said specifications that the entire area of stall room floor should be covered one inch thick with Warren's Kiola Asphalt Floor put down in the best manner, underlaid with two layers of best roofing paper acceptable to the architects, and guaranteed and kept in repair for two years from the time of completion of the work. And it was further provided in said specifications that the defendant should set the stall partitions and posts and finish off the partitions as shown on sketches forming a part of the drawings hereinbefore referred to, and copies of which are hereto annexed.

"The defendant thereupon proceeded to build said stable, and the plaintiff duly paid the defendant all sums to be paid under said contract, and did all other things which, by the terms of said contract, were to be done by him.

"But the defendant wholly failed to set the stall partitions and

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posts and finish off the partition as shown on said sketches, in that it did not lay or bed the planking upon the asphalt as shown thereon, but on the contrary nailed said planking to and through said asphalt floor, and set said stall partitions and posts in a negligent, unskilful and unworkmanlike manner, and in other respects failed to set the same as shown on said sketches.

"By reason of the defendant's failure to set the stall partitions and posts as shown on said sketches, and the negligent, unworkmanlike and faulty construction thereof as above described, said asphalt floor was not water-tight; but as soon as said stable became used as such and said stall room occupied, large quantities of drainage from the stalls leaked through said floor and caused great damage to other parts of said stable and made the same untenantable and unfit for use.

"But the defendant, though requested by the plaintiff to reset said stall partitions and posts as shown on said sketches, or to repair said asphalt floor, neglected and refused so to do; and the plaintiff has been obliged to expend and has expended large sums of money to reset said stall partitions and posts, and make said asphalt floor water-tight and render the stable tenantable, and has suffered other and further damages in the premises."

In the Superior Court the case was tried before *Sherman*, J.

Among the provisions of the contract were the following:

"Article I. The contractor shall and will provide all the materials and perform all the work for the Stable to be erected corner Brimmer, Chestnut and Byron streets, Boston, as shown on the drawings and described in the specifications prepared by Coolidge & Carlson, 22 Congress street, Boston, Mass., Architects which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

"Article II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final. . . ."

"Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be $49,157.31 Forty-nine thousand, one hundred and fifty-seven 31/100 dollars, subject to additions

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and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architects, as follows:

"In monthly payments of eighty-five per cent of money due him at time of application for payment. Said payments shall be only for work actually done on the building and for material actually incorporated into the building.

"The final payment shall be made within thirty-three days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued....

"Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The specifications, among other things, contained the following:

"All materials throughout the building are to be new and the best of their several kinds (unless otherwise specified) and the work executed in the best and most substantial manner and to the satisfaction of the architect."

The following was under the heading "Asphalt Floors."

"The entire area of stall room floor and where shown on second floor to be covered 1" thick with Warren's Kiola Asphalt Floor put down in the best manner under laid with two layers of best roofing paper acceptable to architects, aisles scored as shown, and to be guaranteed and kept in repair for two years from time of completion of work."

Here followed detailed specifications under the headings "Stall Floors" and "Laying."

It was not in dispute at the trial that the design of the stable contemplated the keeping of horses on the third or stall room floor and the storage of carriages on the second floor immediately beneath the stall room floor; that the area of the stall room floor was approximately seven thousand square feet; and that there were about one hundred stalls occupying about two thirds of the area of the floor.

The plaintiff offered to show that, after the floor was completed, it leaked. The defendant contended that the specifications did not

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require that the floor should be water-tight, that if the floor was constructed in accordance with the plans and specifications, no liability against it could arise, whether the floor leaked or not, and asked the judge to rule as matter of law that the specifications did not call for a water-tight floor. The judge refused so to rule and, subject to an exception by the defendant, permitted the plaintiff to introduce testimony tending to show that after the asphalt floor and the stalls had been constructed the floor leaked from various causes.

The findings of fact which were warranted by the evidence are stated in the opinion.

At the request of the plaintiff the judge made the following rulings:

"The defendant was bound to do the work in a proper and workmanlike manner. If leaks were caused by driving nails through the asphalt, the jury would be warranted in finding that this was neither proper nor workmanlike, and if the defendant failed to repair the leaks, the defendant is liable.

"The defendant is not relieved from liability due to poor workmanship and materials by the fact that final payment under the contract was recommended by the architects, unless the architects knew or ought to have known of such poor workmanship and materials."

At the request of the defendant the judge made the following rulings:

"4. In order to recover the plaintiff must show that the defendant failed to comply in some respect with the requirements laid down in the specifications relating to the stall room floors."

"7. Neither the specifications nor the plans contain anything prohibiting the use of nails in fastening the posts and partitions of the stalls to the floor."

"12. If the floor as planned by the architects was a faulty floor, the defendant is not liable to the plaintiff, if the floor was constructed in accordance with such faulty plan of the architect.

"13. The defendant is not liable to the plaintiff for the negligence or incompetence of architects selected by the plaintiff."

"16. The architect having issued a final certificate, in the absence of fraud or palpable error it is not open to the plaintiff to contend that the defendant failed to comply with the contract in relation to the original construction of the floor, but he is limited to his rights under the alleged agreement to keep in repair."

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The defendant also asked the judge to make the following rulings:

"2. On all the evidence the plaintiff is not entitled to recover on the second count."

"5. The fact, if it be a fact, that the stall room floor leaked, or that the floor was not suited to the purpose it was intended for is of no consequence, if the floor was constructed in accordance with the plans and specifications.

"6. The specifications did not require that the floor should be water-tight."

"14. If the defendant failed in some particular to comply with the specifications, but the same damage to the plaintiff would have occurred irrespective of such failure, by reason of the defective design or plan of the architects, it is not liable to the plaintiff, for it cannot be said that the defendant's failure to comply with the specifications was the proximate cause of the damage.

"15. Under the provisions of Article X of the contract, the final certificate of the architect is made conclusive evidence of the performance of the work."

The judge refused to make any of these rulings, and the defendant excepted.

The judge reported the case for determination by this court as follows:

"It appeared in evidence that after the asphalt floor had been laid, the stalls and flooring of plank were constructed and that the portion of the flooring which was specified to be stationary, was made so by means of nails or spikes which were driven through the asphalt to the wooden flooring beneath. The plaintiff contended, among other things, as set forth in its second count, that this method of making the floor stationary was negligent and not in accordance with the specifications.

"At the close of all the evidence, and over the defendant's objection and exception, I submitted the following questions to the jury, which were answered as follows:

"1. 'Was the third floor laid according to the specifications?' The jury answer: 'Yes.'

"2. 'Was the work performed in the best manner as required in the specifications under the title asphalt?' The jury answer: 'Yes.'

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"3. 'Taking the contract with specifications, and considering the use to be made of the second and third floors, where the stalls were, was the third floor to be made water-tight?' The jury answer: 'Yes.'

"4. 'Did the manner of nailing and spiking in the stalls cause leakage through the floor?' The jury answer: 'Yes.'

"5. 'Was that an improper and negligent way of complying with the specifications?' The jury answer: 'Yes.'

"6. 'Was the fact that the tarred paper was not turned up and mopped against the walls, etc., a failure to comply with the requirements in the specifications that the floor be laid in the best manner?' The jury answer: 'No.'

"7. 'Has the plaintiff suffered any damage?' The jury answer: 'Yes.'

"8. 'If so, how much?' The jury answer: '$1,800.'"

"I then ruled that the action could not be maintained on the first and third counts, which were thereupon waived by the plaintiff, and I directed the jury to bring in a verdict for the plaintiff in the sum of $1,800 on the second count.

"By consent of the parties I now report the case for the consideration of the full court. If my ruling directing a verdict for the plaintiff on the second count was wrong, or if any of my rulings or refusals to rule during the trial, excepted to by the defendant, were erroneous and prejudicial to the defendant on the issues raised under the second count, final judgment is to be entered for the defendant; provided, however, that if the only error prejudicial to the defendant shall be found to relate to the damages, then judgment is to be entered for the plaintiff in the sum of $864; otherwise judgment is to be entered for the plaintiff on the verdict."

J. Noble, for the plaintiff.

E. K. Arnold, (*W. B. Luther* with him,) for the defendant.

SHELDON, J. The question whether the defendant was required to make the third floor water-tight, depending entirely upon the construction of the language of the contract and specifications, was one of law for the court and ought not to have been left to the jury. *Globe Works* v. *Wright*, 106 Mass. 207, 216. *Goldstein* v. *D'Arcy*, 201 Mass. 312, 317. No doubt, if the jury had answered the question correctly, this would have been harmless error.

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Bouvé v. *Cottle*, 143 Mass. 310, 315. But they did not do so. The contract and specifications stated carefully and particularly just what the defendant was required to do, and the details of the manner in which it was to do this. It was not bound to go further and bring about a result which it had not agreed to accomplish. Evidently the plaintiff had expected and intended to obtain a water-tight floor. But he selected himself the exact means and mode of construction upon which he relied for the accomplishment of his purpose, and stipulated that the defendant should follow precisely the course thus marked out for it. The defendant could not be held to guarantee that this mode of construction would produce a water-tight floor, or to go beyond what it had agreed to do for this end. *Burke* v. *Dunbar*, 128 Mass. 499.

The stipulation that the floor was "to be guaranteed and kept in repair for two years" does not import an agreement to keep it water-tight. This could not mean more than a guaranty that the work and materials which the defendant was to supply should remain in good order and condition for the specified time. Certainly it could not imply an agreement that the floor should continue to possess a quality which there was no agreement that it should have.

So far as the ordering of a verdict rested upon this ground, it cannot be sustained. On the contrary the judge should have ruled as requested by the defendant that it was not required that the floor should be water-tight.

But the defendant had agreed to execute all its work "in the best and most substantial manner and to the satisfaction of the architect." The jury have found that the defendant's conduct in driving nails through the asphalt was a negligent and improper way of complying with the specifications. We assume that this finding was made upon competent evidence and under proper instructions. If so, it settled the question that the defendant, in this respect at least, had failed to carry out its agreement. Unless there was some other issue that also must be passed upon, it would follow that the verdict for the plaintiff rightly was ordered, and only the amount of damages would remain open.

But there was another issue in the case. There was evidence that the architect had put in as clerk of the works one Willard, whose duty, according to the testimony of the architect, it was,

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to the best of his ability, to look after the interests of the owner and to see that the work went on according to the plans and specifications. These was evidence that when the nails were driven into the asphalt to secure the board flooring, this method was approved by Willard, who said that he could see no other way of fastening the flooring. The manner in which the flooring should be fastened was not fixed by the specifications; but on the evidence another method might have been adopted which would not have made holes in the asphalt. The architect gave certificates for the earlier partial payments and for the final payment to be made under the contract, and the whole amount due thereunder was paid by the plaintiff to the defendant. There was evidence that the final certificate was given after some leaks had been discovered; and on all the evidence of the architect himself and that of Cross,* especially on the re-examination of the latter witness, it could have been found that before the architect in December, 1906, gave the certificate for the final payment, he knew that the nails had been driven into the asphalt and that this had caused at least one leak. The architect to be sure denied this, but it was nevertheless a question for the jury.

Under these circumstances and in view of the fact that no specific manner of driving the nails was provided for in the specifications, the jury might have found that the doing of this work in the way in which it was done had been approved by the architect, that on his approval the work had been accepted by the plaintiff, and that any objection on this ground had been waived and was not open to the plaintiff. The instructions given by the judge upon this issue were very meagre, but we need not consider whether they were open to exception. However this may be, the findings of the jury do not cover the issue thus presented, nor does it appear to have been passed upon at all.

It follows that the findings made did not cover the whole case. They were not sufficient to warrant the ordering of a verdict for the plaintiff. *Couilliard* v. *Eaton*, 139 Mass. 105. Under the terms of the report, judgment must be entered for the defendant.

So ordered.

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* This witness, who was called by the defendant, was the superintendent of a company that had charge of laying the asphalt floor.

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LAWRENCE READE *vs.* WOBURN NATIONAL BANK & others.

Suffolk. January 18, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Mortgage, Of personal property: foreclosure by notice, redemption. *Equity Pleading and Practice*, Memorandum of judge as to interlocutory order.

Review by DECOURCY, J., of the successive statutes of this Commonwealth relating to the recording of notice of an intention to foreclose a mortgage of personal property.

In a foreclosure of a mortgage of personal property by notice, without a sale under a power, R. L. c. 198, § 6, requires not only the recording of the notice of the intention to foreclose but also the recording with it of an affidavit of the service of the notice, and the "sixty days after such notice is so recorded," within which the mortgaged property may he redeemed under § 7 of the same chapter, does not begin to run from the recording of such a notice with the officer's return of service thereon without an affidavit.

Upon an appeal from a final decree dismissing a bill in equity, a memorandum previously made by the trial judge in granting an interlocutory motion to dissolve a temporary injunction does not affect the final decree appealed from.

BILL IN EQUITY, filed in the Superior Court, as amended by consent and leave of court, on June 10, 1909, as of May 14, 1909, to redeem certain horses and other personal property from a chattel mortgage.

The case was referred to Ralph E. Joslin, Esquire, as master. Later the case was heard by *Dana*, J., upon the master's report and exceptions thereto. The judge made a final decree that the first and ninth exceptions of the defendants Harlow and Cummings and the first exception of the defendant bank be sustained, all other exceptions being waived, that upon the facts stated in the master's report the foreclosure of the mortgage was valid and effectual and that the bill be dismissed. The plaintiff appealed.

The exceptions of the defendants Harlow and Cummings sustained by the judge were as follows:

"1. Because the master finds, as a matter of law, that the Woburn National Bank did not legally and effectually foreclose the mortgage of March 13, 1907, given by the plaintiff to Charles

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Cummings and assigned by Cummings to said bank, although the facts found by the master clearly show that the foreclosure of said mortgage was legal and effectual."

"9. Because upon the evidence and the facts found and reported by the master the title to the property passed to the bank by the foreclosure, then from the bank to Cummings by the transfer, then from Cummings to Harlow by the bill of sale, and the master erred in his ruling that the plaintiff has a right to redeem the mortgaged property upon paying to Cummings a certain amount of money."

The exception of the defendant bank sustained by the judge was in substance the same as the first exception quoted above.

The motion to dissolve the injunction, which is referred to in the opinion, was as follows: "Now comes the respondent Florence S. Harlow and moves that the injunction previously ordered in this case be dissolved upon the ground that the facts found and reported by the master show that the plaintiff has no right to have said injunction continued, and upon the further ground that the property is being damaged and much depreciated in value by being held in storage." The memorandum of the judge referred to in the opinion was as follows: "Motion to dissolve injunction granted. It does not appear to the court, that the plaintiff has the ability or the intention to redeem, or that the master's ruling relative to the foreclosure of the mortgage is justified upon the facts set forth in the report and made the basis of said ruling."

The facts found by the master are stated in the opinion.

W. H. Brown, (*W. H. Kenny* with him,) for the plaintiff.

H. P. Johnson, (*E. Johnson* with him,) for the defendant bank.

W. R. Lang, for the defendants Harlow and Cummings.

DeCourcy, J. The master has found that the defendant bank did not legally and effectually foreclose the mortgage of March 13, 1907, upon the property of the plaintiff held by it as collateral security. Exception was duly taken thereto by the defendants Cummings, Harlow and the Woburn National Bank, and the judge of the Superior Court sustained the exception, ruled that upon the facts stated in the master's report the foreclosure of the mortgage was valid and effectual, and ordered that the plaintiff's bill

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be dismissed. The plaintiff's appeal from the final decree brings before us for consideration the validity of said foreclosure.

The contention of the plaintiff is that the attempted foreclosure was ineffective for two reasons: First, because the statutory requirements in foreclosure proceedings were not complied with; and second, because the attempted foreclosure was abandoned or waived. We shall have occasion to consider only the former; and the facts involved, as found by the master, are as follows:

The plaintiff being in default, the cashier of the bank, in compliance with a vote of the directors on January 18, 1909, caused a notice of foreclosure under R. L. c. 198, § 5, to be served upon the plaintiff by a deputy sheriff. It embraced two mortgages given by the plaintiff to the defendant Cummings, dated respectively March 13, 1907, and May 13, 1908, and both assigned to the defendant bank on December 28, 1908. The notice and the officer's return thereon were duly recorded in the office of the city clerk of Woburn on January 19, 1909. As the horses covered by the mortgage of May 13, 1908, have since been sold by the plaintiff with the consent of the bank and of Cummings this later mortgage is of no importance.

Where a mortgagee undertakes to foreclose a mortgage of personal property by merely giving written notice of his intention to do so, the statute expressly provides that "the notice, with an affidavit of the service thereof, shall be recorded wherever the mortgage is recorded." R. L. c. 198, § 6. It is conceded that no affidavit of service was made in this case, but only the ordinary return unsupported by an affidavit. Hence arises the controlling question, whether the mortgage was effectually foreclosed by force of R. L. c. 198, § 7, which provides: "If the condition is not performed or tender of performance made within sixty days after such notice is so recorded, the right to redeem shall be foreclosed."

In terms at least the statutory requirement of an affidavit of service is mandatory. The provision for recording made indispensable by the statute is one that applies equally to the notice and the affidavit. No foreclosure is complete until sixty days after the recording of "such notice," which apparently refers to the notice with the affidavit, as the recording of no other notice is mentioned in § 6 of the statute.

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The history of the statute is consistent with the view that an affidavit of service of the notice is essential to the validity of such foreclosure without sale. At common law the mortgage gave an absolute title to the mortgagee on breach of condition with no right of redemption in the mortgagor. Under Rev. Sts. c. 107, § 4, the mortgagee was allowed to redeem within sixty days after condition broken, unless the property was sold in the meantime. By St. 1843, c. 72, § 1, the mortgagor's rights could not be forfeited until sixty days after written notice to him of the mortgagee's intention to foreclose the mortgage, and the recording of the notice was required. The making and recording of an affidavit of the service of notice of intention to foreclose first appears in St. 1858, c. 3, where such affidavit apparently was left optional with the mortgagee; but the affidavit when made and recorded before foreclosure became evidence of the service. The commissioners appointed for the consolidation and arrangement of the statutes, in c. 151, §§ 6, 7, 8 of their report, retained the statutes of 1843 and 1858, adding only a requirement for the recording not merely of the affidavit but of the same " with the notice." But the joint special committee of the Legislature struck out these sections of the report of the commissioners, and recommended new provisions which made the recording of the notice with an affidavit of service mandatory. These recommendations were adopted by the Legislature and were enacted in Gen. Sts. c. 151, § 7; and since 1860 the law has remained substantially unchanged. Pub. Sts. c. 192, § 8. R. L. c. 198, § 6.

The importance of the change from the earlier statute does not, however, consist in the mere fact that the making and recording of the affidavit has become mandatory, but in the consequence which follows the failure to make and record such affidavit. When the title of mortgaged propety becomes vested in the mortgagee by a sale under the power in a mortgage, the failure to record a copy of the statutory notice of sale and affidavit will not defeat the title already vested by the sale. *Field* v. *Gooding*, 106 Mass. 310. But under the statute in question the mortgagee who sees fit to foreclose without a sale obtains no title by foreclosure which will defeat the plaintiff's right to redeem, unless and until sixty days elapse after the recording of the notice and affidavit. In the present case the recording of the notice only, without the equally essential

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affidavit, did not set running the sixty days necessary to foreclose the plaintiff's rights.

That the mortgagee should be compelled to comply strictly with the terms of the statute does not seem unreasonable; especially as it never took possession of the property. The bank might have foreclosed by selling the horses and other property at public auction under the powers contained in the mortgage; and the surplus, if any, would have been paid to the plaintiff. A foreclosure by notice, if the mortgagee complies with the provisions of the statute and there is anything due on the mortgage, deprives the mortgagor of all interest in the property. *Burtis* v. *Bradford*, 122 Mass. 129.

We are of opinion that the bank did not legally and effectually foreclose the mortgage of March 13, 1907, and that the exceptions of the defendants to the master's report should be overruled. This renders it unnecessary for us to consider the other objections to the alleged foreclosure that are raised by the plaintiff. As the master finds that the several defendants had full knowledge and notice of all the facts, their titles are subject to the plaintiff's right to redeem.

The memorandum of the judge on the interlocutory motion to dissolve the injunction was not a finding on the merits, and does not affect the final decree from which the plaintiff appealed.

Decree reversed.

SARAH TURANSKY *vs.* DAVID WEINBERG & others.

Suffolk. January 19, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Mortgage, Of real estate: foreclosure. *Equity Jurisdiction*, To set aside foreclosure sale.

An unintentional error in the published notice of a foreclosure sale of real estate under a power in a mortgage in stating the date of the mortgage to be foreclosed, if the real estate to be sold was described properly and the record of the mortgage was referred to correctly and no one was misled by the error, does not invalidate the sale.

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Where in a foreclosure sale of real estate under a power in a mortgage all the terms of the power and all the statutory requirements were complied with in good faith, the fact that the price obtained was inadequate does not require that a suit in equity to set aside the sale should be sustained.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 25, 1910, by the holder of a third mortgage on a parcel of land with the buildings thereon numbered 35 on Elmo Street in that part of Boston called Dorchester, to set aside a foreclosure sale of the property under a second mortgage.

The case was referred to Arthur P. Hardy, Esquire, as master. The facts found by him are stated briefly in the opinion. The second mortgage was held and foreclosed by one Shapira, who was made a defendant. The date of the second mortgage was April 30, 1910. In the published notice of the foreclosure sale the date of this mortgage was stated to be April 30, 1909. The sale was advertised for and took place at nine o'clock on a Monday morning. The master found that the mistake in the date was unintentional, that there was no such plot or conspiracy as alleged by the plaintiff between the defendants or any of them, "and that said foreclosure sale under the power contained in the mortgage to Shapira was not a pretended sale but was valid and genuine in all respects, except so far as the court may rule as a matter of law that there was some defect therein."

The case was heard by *Morton*, J., upon the plaintiff's exceptions to the master's report. He made a memorandum of decision as follows:

"I see no just ground for reversing the finding of the master in regard to the alleged fraud concerning the foreclosure sale. I do not think that the error in regard to the date of the mortgage contained in the notice of the sale, or the hour at which the sale was held, or the failure to state the terms of sale at the auction require that the sale should be set aside. It is well settled that mere inadequacy of price does not require a sale to be set aside. Shapira acted, it seems to me, with entire good faith throughout the proceedings. He did not know of the plaintiff's mortgage and she took no steps to inform him of the fact that she held a mortgage on the property or to request information or notice of any foreclosure proceedings that he might institute. The fact that the case may be a hard one for the plaintiff if the sale is allowed

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to stand is not, of course, of itself enough to justify setting it aside. I think that the exceptions to the master's report should be overruled, the report confirmed and the bill dismissed."

Later by order of the justice a final decree was entered that the master's report be confirmed and that the bill be dismissed. The plaintiff appealed.

M. M. Horblit, (*J. Wasserman* with him,) for the plaintiff.

D. B. Beard & F. P. Garland, for the defendants, were not called upon.

HAMMOND, J. We see no reason for reversing the finding of the master and of the single justice as to the alleged fraud concerning the sale. All parties seem to have acted in good faith.

The unintentional error as to the date of the mortgage did not invalidate the notice. The real estate to be sold was properly described and the reference to the record of the mortgage was correct. No one, therefore, desiring to know the precise terms of the mortgage or the land to be sold could have been misled. If it be said that the date of the mortgage as stated in the notice was subsequent to the date of the mortgage held by the plaintiff, so that if she had seen the notice she might have been misled into the belief that the mortgage was junior to the one held by her, the answer is that, as found by the master, neither she nor her husband read the notice, nor were they aware until after the sale that it ever had been published.

There is nothing to show that there was any misunderstanding of the conditions upon which the sale was actually made, or that the interests of the plaintiff were prejudiced by those conditions. Nor is it shown that under the circumstances the hour at which the sale took place was prejudicial to her.

The master has found that all the statutory requirements were complied with in good faith. Inadequacy of price does not require a sale to be set aside. As stated by the single justice the fact that the case is a hard one for the plaintiff is not of itself enough to justify setting aside the sale.

Decree affirmed.

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CHARLES E. SHATTUCK & another, trustees, *vs.* MARY H. STICKNEY & others.

Bristol. January 19, 1912. — February 29, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Devise and Legacy. Trust. Words, "Accumulation."

A testator, having nominated two persons as the executors of his will, devised and bequeathed one seventh of the residue of his estate "to my said executors as trustees for my nephew A. And I authorize and direct my said executors as such trustees to invest the said share, both the principal and the income thereof as it shall accrue, with full authority to them to sell and to reinvest the said principal and income as often as they may deem it expedient for the interest of the trust. Whenever, and not before, they shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said A any part or the whole of the accumulation of said trust. If any balance of such trust fund shall be remaining in the hands of my executors as such trustees upon the death of the said A, then, in that event, the same shall be paid by them as follows: . . . If he (my said nephew) leave neither widow nor issue, then the said trust fund is to be divided among my heirs at law, or so much of the same as shall remain in the hands of said trustees, at the death of my said nephew." The persons named as executors survived the testator and were appointed trustees. On the death of the survivor of them new trustees were appointed who brought a bill for instructions. The testator's nephew A survived and was unmarried and without issue. *Held,* that under R. L. c. 147, § 6, the new trustees had the same discretionary power to make payments to the testator's nephew A that was given to the original trustees, that the word "accumulation" as used in the clause quoted meant the trust fund as accumulated, including both the original principal and the increase from additions of income, and that the trustees had power to pay any part or the whole of such fund to the testator's nephew A.

BILL IN EQUITY, filed in the Probate Court for the County of Bristol on November 28, 1911, by the trustees under the will of George O. Crocker, late of New Bedford, for instructions as to their power and duties under the tenth article of that will.

On appeal the case came on to be heard before *DeCourcy*, J., who reserved it for determination by the full court upon the bill and the answers of the several defendants, the objections to the decree being made a part of the report.

The testator died on May 24, 1887, and his will was proved on July 1, 1887. Oliver C. Stevens of Boston and Charles P.

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Rugg of New Bedford, who were named in the will as executors and trustees, were appointed trustees under the tenth article of the will for the benefit of Amos E. Lawrence, junior, afterwards Amos E. Lawrence, one of the defendants. Stevens and Rugg acted as joint trustees until the death of Rugg, on June 9, 1896, and thereafter Stevens acted as sole trustee under the tenth article until his death on March 25, 1911. Neither Stevens and Rugg acting as joint trustees nor Stevens acting as sole trustee ever paid to the defendant Amos E. Lawrence, any part of the principal of the trust fund created by the tenth article of the will, but they paid him all the income of the fund except the sum of about $18,000, which they accumulated and added to the principal of the fund. On May 12, 1911, the plaintiffs were appointed trustees under the tenth item of the will in place of Rugg and Stevens, deceased, and qualified as such trustees. At the time of the filing of the bill the defendant Amos E. Lawrence was unmarried and had no issue.

The tenth article of the will was as follows:

"X. The remaining seventh of the balance aforesaid of my property, I give, devise and bequeath to my said executors as trustees for my nephew Amos E. Lawrence, Junior. And I authorize and direct my said executors as such trustees to invest the said share, both the principal and the income thereof as it shall accrue, with full authority to them to sell and to reinvest the said principal and income as often as they may deem it expedient for the interest of the trust. Whenever, and not before, they shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said Amos E. Lawrence, Junior, any part or the whole of the accumulation of said trust. If any balance of such trust fund shall be remaining in the hands of my executors as such trustees upon the death of the said Amos E. Lawrence, Junior, then, in that event, the same shall be paid by them as follows: If he leave issue, or issue and a widow, in equal shares to said widow and issue, that is to say one half to the widow, and one half divided among his issue. And if he leave no widow the whole to be divided among his issue. If he leave a widow and no issue, the widow is to receive twenty-five thousand dollars of said trust fund, and the remainder is to be divided among my heirs at law. If he (my said nephew) leave neither widow

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nor issue, then the said trust fund is to be divided among my heirs at law, or so much of the same as shall remain in the hands of said trustees, at the death of my said nephew."

The Probate Court made a decree instructing the plaintiffs that they had the same power and authority as the original trustees to pay any part or the whole of the accumulation of the trust to the defendant Lawrence, and that "the accumulation" of the trust included the original principal of the trust fund as well as the accumulated income. The guardian *ad litem* appointed by the Probate Court to represent the interests of persons unascertained or not in being, and also the executor of the will of Oliver C. Stevens, who was one of the heirs at law of George O. Crocker at the time of his death, appealed from the decree. The guardian *ad litem* objected to the decree on the ground that the authority to pay to the defendant Amos E. Lawrence, which by the will was given to Charles P. Rugg and Oliver C. Stevens, did not pass to the petitioners. The defendant executor of the will of Oliver C. Stevens objected to the decree on the ground that the words "any part or the whole of the accumulation of said trust" referred to and included only income and investments of income, and that the plaintiffs had not the power to pay to the defendant Lawrence any part of the property in their hands as trustees which was the original principal of the trust fund as invested and reinvested.

C. E. Shattuck, for the plaintiffs, stated the case.

G. D. Burrage, guardian *ad litem* of persons unascertained or not in being.

R. H. Gardiner, Jr., for the Old Colony Trust Company, executor of the will of Oliver C. Stevens.

W. G. Thompson, for Amos E. Lawrence.

DeCourcy, J. The first question presented by the bill is, in substance, have the plaintiffs the same discretionary power to make payments to Amos E. Lawrence as was given to their predecessors in the trust, Charles P. Rugg and Oliver C. Stevens, by the tenth item of the will of George O. Crocker? The appeal of the defendant Burrage from the decree of the Probate Court and his objections thereto filed in this court definitely raise this issue. *Bartlett* v. *Slater*, 183 Mass. 152. *Codwise* v. *Livermore*, 194 Mass. 445.

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It is expressly provided by our statute concerning trusts that "a new trustee . . . appointed in the place of a former trustee in conformity with a written instrument creating a trust, shall, upon giving such bond as may be required, have the same powers, rights and duties and the same title to the estate, whether as a sole or a joint trustee, as if he had been originally appointed." R. L. c. 147, § 6. Such has been the law of this Commonwealth for nearly a century. St. 1817, c. 190, § 40. Rev. Sts. c. 69, § 8. Gen. Sts. c. 100, § 9. Pub. Sts. c. 141, § 6. In construing the statute this court has said substantially that where discretionary power has been given to the trustees named in a will but is not strictly limited to them by its terms, the statute clothes their successors with a like authority, unless the words of the instrument clearly indicate that the donor intended to limit the discretionary power to the donees of his personal selection. *Stanwood* v. *Stanwood*, 179 Mass. 223. *Sells* v. *Delgado*, 186 Mass. 25, and cases cited.

An examination of the will of George O. Crocker discloses no such intention on his part to make the discretionary power in Item X personal to the original trustees. One seventh of his estate is given to his executors "as trustees for my nephew Amos E. Lawrence, Junior." The only provision for applying this bequest during the life of the beneficiary is: "Whenever, and not before, they [the trustees] shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said Amos E. Lawrence, Junior, any part or the whole of the accumulation of said trust." It appears that said Lawrence was and is unmarried and without issue. Under the construction urged by the defendant Burrage, that the power given to Rugg and Stevens was a personal confidence to be exercised by them only, all payments from this trust fund to the person for whose benefit it was expressly created must cease upon the death of the original trustees, —an event which the testator must have foreseen as liable to happen and which in fact has occurred. While it may be conceded that the testator had confidence in the trustees selected by him, as is usually the case, we cannot assume that he considered them the only men who could ever be entrusted with the power of deciding when it was safe and proper to make payments to his nephew. And it is plain that he did not intend to restrict the

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benefit of the bequest to the period of the lives and trusteeship of Rugg and Stevens, rather than to the period of the life of Amos E. Lawrence, junior, for whose benefit it was designed.

A consideration of the other provisions of the will confirms the conclusion that the testator intended to make this discretionary power one that is blended with the trust to which it is attached and not personal to Rugg and Stevens. Frequently in the will he refers to "my executors," "my said executors," "my said executors in trust" and "my executors in trust for the benefit of my sister;" but only once, viz., in Item I, are Rugg and Stevens as executors and trustees mentioned by name. For instance in Item III the discretionary power to pay $5,000 towards a free hospital within five years after the testator's death is conferred upon "my said executors," without naming them. And it is significant that when he did intend to limit discretionary power to the person selected by himself he used apt words to express that intention; as in Item VII, where he directs his executors to pay "to my sister, Mary H. Stickney, the sum of ten thousand dollars to be used by her at her *sole* discretion for such charitable purposes as she may deem best."

We are of opinion that the decree of the Probate Court was correct in instructing the plaintiffs that they have the same power and authority to make payments to the defendant Amos E. Lawrence as was given to their predecessors in the trust by the terms of Item X of said will.

The second question presented by the plaintiffs requires us to determine whether their discretionary power to make payments to the said Amos E. Lawrence is confined to the accumulated income of the trust fund, or extends also to the original principal. What was the intention of the testator when he authorized the trustees to pay to said Lawrence "any part or the whole of the accumulation of said trust"?

Before analyzing Item X, which gives rise to this controversy, it is important to examine the will as a whole. After bestowing about $66,000 upon public charities and kindred objects, distributing about $40,000 among personal friends and domestics and giving certain real estate and a war claim to his nephews Oliver C. Stevens and Charles D. Stickney and his sister Mary H. Stickney, the testator proceeds to dispose of the balance of his

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estate. The value of this residue does not appear, but from the statement made at the argument that the one seventh in controversy amounts to $220,000, it is apparent that there remained a large sum for disposition. His heirs at law at the time of his death were a sister, the three children of one deceased sister and the two children of another. Including with these the son of his surviving sister, he divided the entire balance of his estate in seven equal parts among them. To his niece and four of his nephews he made absolute gifts. The share of his sister he placed in trust for her, but empowered her to terminate the trust at any time in her discretion. The remaining one seventh of the balance was given, in the language of Item X, "to my said executors as trustees for my nephew Amos E. Lawrence, Junior."

The reasons which induced the testator to place the share of this nephew beyond the control of himself and of possible creditors do not appear. It may be significant that the case of *Broadway National Bank* v. *Adams*, 133 Mass. 170, had been recently published at the date of the will. But it is quite evident that the testator intended to treat alike all his heirs, including this unmarried nephew, and that the restraint upon the nephew's power to control his one seventh portion was placed there solely for his benefit. It is also apparent that the testator regarded as this nephew's share the original fund and any income that the trustees might deem it best to withhold from him and to reinvest. Throughout Item X the testator treats this share, including the original principal as well as the accumulated income, as a single fund, not only for the purposes of investment but also for those of distribution. The trustees are authorized to invest and reinvest "said share, both the principal and the income thereof," as a single and increasing fund. Upon the death of the beneficiary Lawrence, "if any balance of such trust fund" shall be remaining in the hands of the trustees, "if he leave . . . no widow, the whole" of the balance is to be divided among his issue. In the event of his death, leaving neither widow nor issue, provision is made for division among the testator's heirs at law of "the said trust fund . . . or so much of the same as shall remain in the hands of said trustees, at the death of my said nephew." And from the expression "if any balance of such trust fund shall be remaining . . . upon the death of the said

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Amos E. Lawrence," it is clear that the testator realized and intended that the entire fund, principal and interest, might be paid to said Lawrence, and that no balance might be remaining at the time of his decease.

It is urged by the defendants other than Lawrence that the words limiting payments in favor of Lawrence to the "accumulation" of the trust fund prevent the payment to him of any portion of the original principal; and recourse is had to the meaning of the word "accumulation" as defined by dictionaries of authority. Where the intention of the testator is apparent from a careful examination of the will as a whole, it will not be defeated by an inaccurate use of language. Moreover, as is argued by counsel for Lawrence, if the word "accumulation" be considered, not in its primary signification of the action or process of accumulating, but in its equally accurate secondary meaning of the result of the process of accumulating, or the accumulated mass, even the words used by the testator to indicate the source from which payments to Lawrence himself might be made may well be interpreted to mean "any part or the whole of the trust fund as accumulated," including both the original principal and the increase from additions of unpaid income.

Be that as it may, the unsoundness of the contention that the testator intended by the word "accumulation" to refer only to the accumulated income of the fund, is evident from the fact that such construction would result upon the death of the beneficiary in the distribution of only the balance of the accumulated income with no disposition provided for the principal. A construction of a carefully prepared will which involves intestacy as to a large and important share is not to be readily adopted. *Damon* v. *Bibber*, 135 Mass. 458, 461. *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95, 99.

We are of opinion that the Probate Court, in construing the clause "any part or the whole of the accumulation of said trust" as referring to and including the entire trust fund in the hands of the plaintiffs, was correct, and that the decree appealed from should be affirmed.

So ordered.

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AMOS BARTLETT & others, trustees, *vs.* ESTHER SLATER & others.

Worcester. March 30, 31, 1911. — March 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DECOURCY, JJ.

Trust, Duties of trustee under compromise agreement. *Probate Court. Compromise Agreement. Equity Pleading and Practice*, Amendment, Report, Decree, Appeal.

A testator by his will left the residue of his estate to trustees, who were the executors named in his will, to accumulate for twenty years and eleven months after his decease, and then to be paid in equal shares to four minor children who survived him and of whom his widow was appointed the guardian. The residue included extensive mills manufacturing cotton and woollen goods conducted under one management and operated as a whole. The will authorized the executors to carry on the testator's cotton manufacturing business "for the purpose of winding it up, so long as they find it advisable so to do, to close it up without serious loss . . . and when as executors they shall have wound up said business, they are to pay over the proceeds thereof to themselves as trustees." By authority of the Probate Court and with the consent of all persons interested all the manufacturing properties and business were conveyed to a corporation formed for the purpose, and the executors held the bonds, preferred stock and common stock of this corporation representing the manufacturing properties. Later an agreement of compromise, approved by the Probate Court, was made between the executors and trustees and the testator's widow as guardian of the beneficiaries of the trust. This recited that "Whereas a controversy has arisen between the said guardian and the said executors and trustees respecting their powers and duties as regards the securities" of the corporation, "the continued operation of said mills by the said executors and trustees" and other subjects-matter, "the executors shall transfer to themselves as trustees, all of the securities" of the corporation "which are now held by them as executors, and thereupon their executors' accounts shall, as between all parties in interest, be considered as closed, settled and allowed." There followed provisions that the trustees as shareholders of the corporation should cause to be elected a board of directors consisting of themselves and the guardian and her counsel and that the trustees as directors should be "subject to no further or other responsibility or liability than that imposed upon directors in similar corporations." This agreement contained a provision that any party to it might at any time apply for an order and decree for the sale of the securities of the corporation. There was no appeal from the decree of the Probate Court by which the agreement of compromise was approved. More than two years later the trustees brought a bill for instructions praying that the court would determine whether the plaintiffs might sell the securities of the corporation and, if so,

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upon what terms and conditions. These securities constituted more than half of the trust fund and their estimated value was more than $6,000,000. The trust had existed more than eleven years and would terminate in about nine years. The agreement of compromise had become unworkable. Before the making of that agreement there had been no necessity of borrowing money but since then it had been necessary to borrow large sums of money, the amount of capital needed for the business was increasing constantly and at the time of the filing of the bill it had become necessary soon to invest large sums of new capital for replacement and extension of the plant. The guardian of the beneficiaries objected to a sale of the securities. *Held*, that, assuming that under the agreement of compromise the property should be retained by the trustees until there had been some material change in the situation looking to the contrary, a change had occurred, which had increased the unfitness of the property for trust investment and the impropriety of the carrying on of the business by the trustees, indicating that at least the shares of stock of the corporation both common and preferred should be sold. MORTON & BRALEY, JJ., dissenting.

Where, in a case in which the Probate Court has jurisdiction of the subject matter and of the parties, that court makes a decree approving an agreement of compromise under St. 1907, c. 447, and there is no appeal from the decree, the question whether the Probate Court in approving the agreement rightly interpreted the statute is not open in any further proceedings in that case.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities forming a part of the trust property, a motion made by the defendants to strike out from their answer an admission that the compromise agreement was unworkable here was held to have been denied rightly within the discretion of the single justice who heard the case, and it further was held that the defendants were not harmed by the denial of the motion, because the justice found as a fact, on evidence warranting such a finding, that the agreement had become unworkable. MORTON & BRALEY, JJ., dissenting as to the character of the alleged admission and as to the finding warranted by the evidence.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities forming a part of the trust property, where a petition was pending for the removal of the trustees, it was *held*, that, although the petition for the removal of the trustees might have been heard with the bill for instructions, yet on the facts of the case it was not so closely allied to the question whether the securities in question should be sold as to make the consideration of both at the same time essential for the purposes of justice, and that it could not be said that the single justice who heard the case exercised his discretion wrongly in declining to hear the petition for the removal of the trustees with the bill for instructions; and, irrespective of the personality of the trustees, it was ordered that a sale of at least a part of the property should be made by the trustees for the time being, subject to the approval of a single justice of this court. MORTON & BRALEY, JJ., dissenting.

By the equity practice established under the statutes of this Commonwealth, when a final decree in a suit in equity has been entered formally and an appeal has been taken, the case cannot be reported for determination by this court, and the appeal comes before this court with or without a report under R. L.

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c. 159, § 23, by the justice who made the decree, not of the case, but only of the material facts found by him.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities constituting more than half of the trust fund, a decree made by a single justice, authorizing a sale at a fair price but ordering "that the terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a single justice of this court," is not a final decree, and under R. L. c. 159, § 27, may be reported as an interlocutory decree for determination by this court.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities of an estimated value of more than $6,000,000 and constituting more than half of the trust fund, a single justice made an interlocutory decree authorizing a sale by the trustees subject to the approval of the court, and denied a motion of the defendants to restrict the order to the sale of the securities without authorizing the plaintiffs to conduct the sale. He declined to consider charges against the general ability or inclination of the plaintiffs to act as trustees ought to act in such a matter, and found as a fact that none of the trustees had any such personal interest in the proposed sale of the securities as disqualified him from acting loyally and to the best of his ability for the trust in making the sale. *Held*, that it did not appear that the justice exercised his discretion wrongly in denying the motion. MORTON & BRALEY, JJ., dissenting.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities of great value constituting more than half of the trust fund, where a single justice makes an interlocutory decree authorizing a sale of the securities subject to the approval of the court, it is right for the justice to deny a motion for the insertion in the decree of a provision to the effect that the price at which the securities shall be sold shall be determined finally and without right of appeal by a decree of a single justice, because a single justice would have no jurisdiction to make a decree either interlocutory or final from which an appeal could not be taken.

HAMMOND, J. This is a bill for instructions* brought by the trustees under the will of Horatio N. Slater, late of Webster in this State, setting forth that as such trustees they hold certain securities and praying that the court will by its decree determine whether the plaintiffs "may sell said securities and if so upon what terms and conditions." It was heard by a single justice† who entered a decree in substance that the securities or a part of them should be sold. He was of opinion that this was a final decree so that it was ripe for entry and hearing in the full

* Filed in the Supreme Judicial Court on October 25, 1910.

† *Rugg*, J.

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court, but being of opinion that the matters raised were of such importance that in the interest of all parties they ought to be decided before further proceedings, by agreement of the parties he has reported all questions which would be open on an appeal therefrom, and all exceptions so far as material to said decree, for the determination of this court; and the case is before us on this report.

1. The main question is whether the securities or any part of them shall be sold. Mr. Slater died August 12, 1899, leaving a widow, Mabel H. Slater, and as his heirs at law (in addition to his children by his first wife) four minor children, the defendants, the issue of his marriage with the said Mabel. He left an estate amounting to several millions of dollars. At the time of his death he was engaged extensively in the manufacture of cotton and woollen goods in Webster, and had been so engaged for many years. The mills for the manufacture of cotton goods were owned by him in his individual capacity, while the mills for the manufacture of woollen goods belonged to the Slater Woolen Company, a corporation organized under the laws of this State. He owned, however, all but two hundred shares of the five thousand shares into which its capital stock was divided. The business, both cotton and woollen, had long been conducted under one management, and all the manufactured goods were sold by a single agency under the name of S. Slater & Sons. The connection of the cotton and woollen business was such that the parties interested seem to have thought that the value of the business depended upon its continued operation as a whole, and that any dismemberment would be disastrous.

By his will, after various bequests, the testator devised in the fourteenth clause the residue of his estate to trustees to accumulate for twenty years and eleven months after his decease, and then to pay over and convey, share and share alike, "to the children of my marriage with my wife Mabel" the trust fund so accumulated, one half of each child's share on the arrival of such child at the age of twenty-five years, and the remainder on its arrival at the age of thirty years, with provisions for the various contingencies which might arise in the case of the death of any or all of the children with or without issue before arriving at the ages above named, and also in case the period of twenty years

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and eleven months should expire before the children should reach such ages respectively. By the fifteenth clause he appointed the present plaintiffs executors and trustees, and made provision for the investment, management and sale of the trust funds, which so far as material to this inquiry will be hereinafter considered. After giving his executors power to sell at public or private sale any part of his estate real or personal not specifically devised, upon such terms and conditions as they should think fit, he gives specific directions as to his manufacturing business in the following language:

"I also authorize and empower my executors to carry on, as executors, in the name of my estate, my manufacturing business, and other business outside of corporations, for the purpose of winding it up, so long as they find it advisable so to do, to close it up without serious loss; and to that end, and that there may be no misapprehension on the part of any person interested in the result of said business, either said executors, beneficiaries under this will, or creditors of said business so conducted after my decease, I hereby declare, and it is my will that my said executors are authorized to risk as capital for the purpose of carrying on said business only such part of my estate as may be invested in said business, at the time of my decease, in the shape of stock raw, wrought and in process and all such creditors are hereby notified that my estate is to be liable to the extent above stated and no more. And when as executors they shall have wound up said business, they are to pay over the proceeds thereof to themselves as trustees, and as trustees hold the property derived from said business in trust, as herein before provided."

Various provisions of the will were not satisfactory to some concerned and there was opposition to its allowance as it stood. Pursuant to a compromise agreement entered into by all parties interested and approved by the Probate Court, the terms of which are here immaterial, the will, as it was then supposed, was proved and allowed by a decree of that court on September 5, 1899, subject to the compromise, and the plaintiffs were appointed executors. Subsequently it was discovered that the Probate Court had no jurisdiction to make such a decree (see *Abbott* v. *Gaskins*, 181 Mass. 501), and by reason of that and other facts another compromise agreement, the terms of which are not here

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material, was entered into; and by a decree of a single justice of this court, dated June 17, 1902, the will was finally allowed in accordance therewith, and the plaintiffs were appointed executors and trustees. Previous to the decree of the Probate Court of September 5, 1899, the plaintiffs had been appointed special administrators, and up to September 5 as special administrators, and subsequently, nominally as executors but in reality, as it turned out, still as special administrators, they carried on the business until the decree of June 17, 1902. Subsequently they claimed compensation upon that footing, largely in excess of what the will would have allowed them either as executors or trustees.

In May, 1903, by authority of the Probate Court, the executors, with the consent of all concerned, conveyed to a corporation organized for that purpose under the name of S. Slater & Sons, Incorporated, all the manufacturing properties and business, including their controlling interest in the stock of the Slater Woolen Company, and received in payment therefor and in lieu thereof the bonds, stocks and securities of the new corporation, to wit: Bonds, $1,500,000: Preferred stock, $1,500,000: Common stock, $3,000,000, and a note for surplus assets to the amount of $385,266.59. These are the securities to which the present bill relates.

From the allegations of the bill upon which the decree was made and the terms of the decree itself, it is manifest that this transfer was not a sale within the terms of the will for the purpose of a final winding up of the business, but was merely a change in the method of holding the property to the end that the sale contemplated in the will could be more easily and advantageously made. The testator's direction to the executors to sell was as applicable to these securities received from the corporation as it theretofore had been to the property conveyed to it. From the time of the sale to some time in 1906 the plaintiffs were the sole directors, but in 1906 the board was increased to five by the addition of Mr. Olney and Mrs. Slater, the guardian of the defendants.

There was more or less friction however between the executors and the guardian, and in June, 1906, another compromise agreement was entered into; but either because the parties or some of them were advised that no court had jurisdiction to validate the agreement, or for some other reason, it never was presented to

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any court for approval and never became operative. It was signed by the parties, however, and the statement contained in the preamble is illuminating as to the position of the respective parties at that time upon the matter of the sale of the securities in question. After reciting the sale of the manufacturing properties to S. Slater & Sons, Incorporated, the paper proceeds as follows:

"Whereas the said manufacturing properties or the proceeds thereof whenever the securities representing the same shall be sold, will go to and be held by the said trustees as part of a residuary trust fund constituted by said will, the entire beneficial interest in which fund is vested in the four minor children of said testator of whom Mabel Hunt Slater, widow of said testator, is the guardian; and

"Whereas a controversy has arisen between the said guardian and the said executors and trustees respecting their powers and duties as regards the securities of said S. Slater & Sons, Incorporated —

"The guardian claiming that said securities cannot under present conditions be sold without serious loss to said residuary trust fund, and that for the benefit of said fund and in the interest of her wards the executors should continue to hold said securities and as directors of said corporation should continue to manage its affairs and said manufacturing properties as going concerns; and

"The executors and trustees claiming that under said will it is or may be their duty as executors to make an immediate sale of said securities with a view to their receiving and holding the proceeds thereof as trustees of the said residuary trust fund, and that such immediate sale is or may be necessary to their personal protection against possible future claims by parties beneficially interested in said residuary trust fund;

"Now, therefore, in settlement of said controversy it is agreed as follows . . . :"

It will be seen upon an inspection of this agreement in its entirety that whatever might have been the secret desire of the guardian as to the preservation of this property to the expiration of the trust, to the end that her sons or one of them could carry on the business, nothing of it appears in this paper. Her con-

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tention as there expressed was not that the property should remain permanently in the fund and not be sold at all, but that it could not be sold under the then "present condition" without serious loss, which of course eventually would fall upon the trust fund; and that in the interest of her wards the executors as such should continue to manage the property as a going concern. The contention of the executors was that under the will it was their duty to make an immediate sale, so as to hold the proceeds thereof as trustees, and that such immediate sale was necessary for their personal protection against possible future claims by parties beneficially interested in the trust fund. There is nothing in all this to show any intention to modify the terms of the will as to a sale. Indeed the whole document is perfectly consistent with the view that the sale should be made in accordance with the terms of the will, that is, when it could be done without serious loss. As before stated, nothing ever resulted from this agreement, and it is alluded to and commented upon as a part of the history of the case and as tending to show the apparent and declared attitude of the parties at that time.

Meanwhile the friction between the executors and the guardian became accentuated, the situation being satisfactory to neither; and finally, in July, 1908, another compromise agreement was made, and upon a petition presented by the present plaintiffs as "executors and trustees" and signed by all parties in token of their assent, the agreement was validated in October, 1908, by a decree of the Probate Court. In view of the conflicting claims of the parties as to the nature and effect of this agreement and the decree thereon, and of their bearing on the questions before us, it becomes necessary to consider these proceedings somewhat in detail.

The petition, after reciting the appointment of the petitioners as special administrators, the incorporation of S. Slater & Sons, Incorporated, the transfer to it of the manufacturing property and the receipt from it of the securities in payment therefor, and the management of the manufacturing properties and business both before and after the foundation of the corporation, all as hereinbefore outlined, and that the trustees are the owners of all the stock of the corporation and are still managing its affairs as directors, proceeds as follows:

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"3. A controversy concerning the disposition of the stock of said corporation has arisen between the petitioners and Mabel Hunt Slater, the guardian of the minor children of the testator, who, as the beneficiaries of the residuary trust fund constituted by said will, are the only parties directly and beneficially interested in said stock:

"The petitioners claiming that said stock should be immediately sold and cannot be retained by them without serious personal risk:

"And said guardian claiming that it is competent for the petitioners to continue to hold said stock and as directors with others of said corporation to manage and operate said manufacturing plants and properties for the benefit of said residuary trust fund in the manner and by the methods customarily applicable in the like cases and that the interest of her wards requires that course to be pursued.

"4. A controversy has also arisen between said Bartlett, Washburn and Smith as special administrators, executors and trustees of said estate and said guardian over the administration of the estate in the possession of said Bartlett, Washburn and Smith as special administrators, executors and trustees as aforesaid and their accounting therefor, including compensation received by them in any and all capacities under the will and otherwise and of expenditures made by them in the conduct of the manufacturing business of the testator at Webster, cotton and woollen, both before and after its incorporation:

"The petitioners claiming that their accounts as special administrators, executors and trustees beginning August 16, 1899, and ending July 17, 1908, are entitled to allowance in each and every item thereof:

"And said guardian objecting that said accounts are not entitled to allowance:

"5. A controversy has also arisen as to whether the three trustees can act in the absence of a unanimous agreement.

"6. Incidental to said controversy respecting the holding of the stock of said corporation and the operation of the manufacturing properties thereby represented, a controversy has also arisen respecting the filling of future vacancies in the board of trustees and in the board of directors of said corporation and respecting

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the compensation to be received by the trustees respectively succeeding the trustees named in the will."

The petition then avers that for the settlement of the controversies an agreement which is annexed to the petition has been reached; and the prayer in substance is that the agreement may be validated by the court.

The agreement annexed, after reciting that the securities in question are held by the executors, and all the affairs of the corporation are controlled by them as directors of the corporation, proceeds as follows:

"Whereas the said manufacturing properties or the proceeds thereof whenever the securities representing the same shall be sold, will go to and be held by the said trustees as part of a residuary trust fund constituted by said will, the entire beneficial interest in which fund is vested in the four minor children of said testator, of whom Mabel Hunt Slater, widow of said testator, is the guardian; and

"Whereas a controversy has arisen between the said guardian and the said executors and trustees respecting their powers and duties as regards the securities of said S. Slater & Sons, Incorporated, the continued operation of said mills by the said executors and trustees and the other subjects-matter shown by the provisions of this agreement.

"Now therefore, in settlement of said controversy, it is agreed as follows, to wit:

"1. The executors shall transfer to themselves as trustees, all of the securities of S. Slater & Sons, Incorporated, stocks and bonds which are now held by them as executors, and thereupon their executors' accounts shall, as between all parties in interest, be considered as closed, settled and allowed."

It then provides in substance that until the further order of the court the trustees having received the securities may as shareholders perform the several duties of shareholders and cause to be elected a board of directors in the manner therein set forth, the details of which will be hereinafter more fully stated, that the "trustees, or their successors, as directors and such of said trustees, if any, as may be executive officers, may participate in the management and operation of the said manufacturing properties, and the three trustees, now acting as president, vice-president,

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and treasurer of said corporation, shall continue to receive such compensation from said corporation as they have heretofore received until resignation, death, or the termination of the residuary trust and the successors of the executive officers now serving may receive such compensation as the board of directors shall from time to time determine;" that "the trustees, as stockholders, may permit the affairs of said corporation, including the making of necessary repairs, improvements and additions, to be administered in accordance with the business principles and methods applicable to the management of similar manufacturing corporations;" and that the trustees, "so long as they shall hold a control of the stock, may permit said business to be conducted for the benefit and at the risk of said residuary trust fund, as and to the extent as hereinafter set forth, and any dividends paid to said trustees as holders of said stock, shall thereafter cease to be available for use in the business of said corporation and shall form a part of said permanent residuary trust fund; provided, however, that all expenditures for operation, maintenance, betterment of the plant or additions thereto, shall be made from the funds and upon the credit of S. Slater & Sons, Incorporated, and in no circumstances shall affect or involve the remainder of said residuary trust fund."

It then provides in substance that all of the past acts of the present trustees, in whatever capacity done as representing the estate or as officers of the corporation "including the compensation received by them in all capacities under the will or otherwise," are ratified and approved, and all their accounts up to date including their accounts as trustees of another fund in which Mrs. Slater had a life interest are to be considered as allowed by the Probate Court.

After making some provision with reference to other trusts under the will not here material, and providing that in the event of a disagreement among the trustees in regard to any matter within their control the majority shall control subject to the right of the minority to apply to the court for instructions, the agreement ends as follows:

"9. The executors and trustees, or any of them, the guardian of said minor children, or any other party or parties in interest, may at any time apply to said Probate Court or any other court

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having jurisdiction, for an order and decree for the sale of said securities of S. Slater & Sons, Incorporated, or for such other order and decree respecting said manufacturing business, or the dissolution of the corporation, as the facts may warrant."

The proceedings by which this agreement was validated took place under St. 1907, c. 447. Whether this statute was rightly interpreted by the Probate Court is not now before us. The court had jurisdiction of the cause and of the parties and was called upon to construe the statute, and its decision, there having been no appeal therefrom, whether right or wrong, must be regarded as the law of the case. Indeed the plaintiffs do not contend to the contrary.

What is the true meaning of the agreement and what is the legal effect of the decree? It is well to look into the circumstances under which the agreement was made. The will prescribed what should be done with this property enlisted in the cotton industry. The executors were to carry on the business only for the purpose of winding it up, "so long as they find it advisable so to do, to close it up without serious loss." Notwithstanding this express direction the executors as such had been carrying on the business for nearly six years; and this they had done under the weight of serious financial responsibility. If called to account for holding the property so many years they might find difficulty in justifying themselves on the theory that during all that period there never had been a time when the property could have been sold without serious loss. The property was not of a peculiar kind. The mills were in good condition and the profits were large. The proposition that such property under such circumstances could not have been sold during that time for a fair price is one not easily accepted, and in any event not capable of very satisfactory proof. And that is so even if, as contended by the defendants, there was in addition to the value of the physical property a value arising out of the good will. Moreover, for every act done in carrying on this business the plaintiffs were answerable as executors; and they knew not whether or to what extent their acts involving millions of dollars might be challenged as unwise or inconsistent with their official duties. It was an unnatural and somewhat perilous position for them. The guardian on the other hand had come finally to feel that the business, if possible, should

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not be sold, but that it was competent for the plaintiffs still to hold the stock and as directors in company with others of the corporation to carry on the business for the benefit of the trust even to its expiration. She was disputing the amount of their claim for compensation and she could if she chose contest the account of the executors as to expenditures and generally as to their stewardship. During all these years there had been more or less friction. The situation had been unsatisfactory to both parties, and during the period attempts to sell and attempts at compromise had been made, but all to no avail. After this history and under these circumstances the compromise was made and approved by the court.

It is to be noted that upon the face of it there is a great difference in the manner in which the various matters in dispute are treated. The most of them were finally settled and no further action was to be had concerning them. For instance, the transfer from the executors to the trustees was to be final. All acts of the petitioners were ratified and their accounts including the matter of compensation were finally settled. As to these various things nothing more was to be done.

But as to the securities in question and the manufacturing business, the agreement provides for further action at the request of either party. The guardian desired that the property should be kept by the trustees and the manufacturing business carried on "in the manner and by the methods customarily applicable in the like cases;" and it is stated in substance by her counsel in the argument before us that her purpose was to have this property kept to the expiration of the trust in order that the business which had been for years in the Slater family should be carried on by her sons. The plaintiffs desired that it should be immediately sold. The agreement neither provided that the property should be immediately sold, as the plaintiffs contended ought to have been done, nor that it should be kept and the business carried on until the end of the trust in the manner in which such business usually is carried on, as the guardian desired; nor did it attempt to settle finally the question what should be done with the property. As to this the agreement on its face was provisional only. While a method is provided by which the business may be carried on so long as the property is held by the trustees,

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it is nowhere expressly stated how long it shall be so held. If it had been the intention of the parties that it should be held in any event until the expiration of the trust, there can be no doubt that under the circumstances this intention would have been expressed in the agreement. Clearly the time during which the property should be held was subject to a contingency. All parties recognize this. They differ only as to the nature of the contingency.

At the hearing before the single justice the plaintiffs contended that so far as these securities were concerned the agreement furnished merely a *modus vivendi* until they could be sold without serious loss, and that the direction of the will to sell still continued. On the contrary the guardian contended that the true construction of the agreement was that the testamentary direction to sell was nullified and that the trustees were to hold the securities as a part of the trust fund unless meanwhile there should be a material change in the situation indicating that they should be no longer held.

It is well to consider the anomalous situation to which such a construction would lead. Before these proceedings the securities never had been a part of the trust fund but had been held by the executors not for the purpose of carrying on the business indefinitely as a matter of investment, but only for winding it up without serious loss. After the proceedings, as the guardian contends, the trustees as such are to hold the securities as a part of the trust investment to the expiration of the trust in July, 1920, a period of twelve years from the time of the execution of the agreement, an investment utterly inconsistent with the directions of the will as to the kind of property of which the trust fund should be composed.

Moreover, while holding the property as trustees they are to be relieved from the liability imposed by the general rules of law upon trustees respecting the nature of investments made by them. As stockholders they are to perform the usual duties of stockholders, and as directors they are to be "subject to no further or other responsibility or liability than that imposed upon directors in similar corporations organized under the laws of [this] Commonwealth."

But in fact they as stockholders cannot perform the usual duties as stockholders. A most important duty as well as right

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imposed upon or belonging to stockholders is that of electing the directors. Under this agreement that important duty cannot be performed nor that right exercised except in the most limited manner. The agreement provides how the directors shall be elected and who they shall be. There are to be at the start five, the three trustees, Mr. Olney and Mrs. Slater. As to changes the agreement provides as follows:

"Any director may resign as director. Any vacancy in the board of directors, arising from such resignation or otherwise, shall be filled in the following manner, to wit:

"In case of the declination or resignation as director and trustee, or death of either said Washburn or Smith, the successor of said Washburn or Smith so leaving office shall be a person agreeable to the remaining one of these two directors.

"In case of the resignation as director and trustee, or death of said Bartlett, the vacancy thus created shall be filled by some person to be nominated by Mabel Hunt Slater or by the guardian of her children for the time being.

"In case of the declination, resignation or death of Richard Olney, Esquire, such vacancy shall be filled by the election of such person as shall be mutually agreeable to said Washburn and Smith and Mabel Hunt Slater or the guardian of her children for the time being, and in the event of the death of Mabel Hunt Slater, the guardian for the time being shall be elected to succeed her as a member of the board of directors."

In a word, this property which under the will never was to be held by the trustees and never was to become a part of the trust fund, which is of a kind that neither by the general rules of law nor by the specific directions of the will should become a trust investment, was to become a part of this trust fund under an agreement which exempts the trustees from the general rules of the law as to liability, subjecting them only to the liability statutory or otherwise of stockholders and directors of similar corporations, and all this when by the terms of the agreement the stockholders as such have no controlling voice in the election of the directors, and when in one contingency reasonably soon to be expected, namely, the retirement of Mr. Bartlett as a director, the trustees may be in the minority and consequently unable to control the management of the business. Considered with refer-

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ence to the will, the usual method of conducting the affairs of a corporation and the general rules of law with reference to trust investments, the agreement as thus construed creates an anomalous condition. Moreover the property is of the estimated value of at least six millions of dollars and constitutes more than half of the trust fund; and as contended by the guardian this anomalous situation is to continue until the expiration of the trust.

In view of the circumstances under which the agreement was made, the provisions of the will both as to the final disposition to be made of this property and the kind of property in which the fund is to be invested, as to the nature of which provisions there can be no reasonable dispute and hence no reasonable ground for controversy, of the anomalous situation as above outlined to which the construction contended for by the guardian would lead and the provision that at any time application might be made to the court for such an order for the sale of the securities as the facts may warrant, there are strong reasons for holding that the proceedings ought not to be interpreted as a final adjudication that until there should be a change in the circumstances the property should constitute a part of the trust fund even to the end of the trust, and for adopting the construction for which the plaintiffs contend.

But we do not find it necessary to adopt this construction. We are of opinion that even if as contended by the guardian the true construction of the agreement is that the property should be held by the trustees until there should be some material change in the situation looking to the contrary, still the plaintiffs have made out a case. There has been such a material change in the situation. In the first place the agreement has become unworkable. The plaintiffs so allege and the answers admit it; the single justice so finds, and the evidence justifies the finding. This of itself would warrant a court in determining that the whole question of the propriety of holding the securities should be reconsidered. But there are other material changes which of themselves are sufficient to justify if they do not require the sale of these securities. The demand for woollens has fallen off one half since 1908; the profits of the business are subject to great fluctuations; the years during which the business was carried on up to 1908 were years of prosperity; there was a loss in 1908, although

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in 1909 there was a large profit. Before 1908 there had been no necessity of borrowing money, but since then it has been necessary to borrow large sums of money. The amount of capital needed for the business is constantly increasing, and it now has become necessary to invest large sums of new capital, estimated at two millions of dollars, for replacement and extension of the plant in the next few years.

If it be said that there are great changes in every kind of business, especially in manufacturing business, great profits being made some years and corresponding losses in other years, that in a business like this it is generally necessary to lay out large sums in keeping up the plants, that all these changes are necessary and that no business man would think of selling out or discontinuing his business on account of such changes, that the manufacture of cotton and woollen goods is a staple business and notwithstanding changes and reverses must in the long run be remunerative under proper management, no matter what may be the changes effected in the general situation by tariff laws or other causes, the answer is plain.

We are not dealing with the ordinary business, nor with the property, of a business man. We are dealing with an investor, and that investor not in his individual capacity but as a trustee. Nowhere in the agreement or in the decree does it appear expressly, nor, in our opinion, by fair implication, that the trustees were thereafter to hold the property under the same conditions as to the propriety of selling as are applicable in the case of a business man acting solely for himself. All along the trustees continue to be trustees and the property continues to be trust property. Neither as trustees nor individuals can they be expected to indorse paper or otherwise make themselves personally liable for money borrowed for the corporation, or for sums to be expended in the renovation or extension of the plant. It is obvious that these several changes in the situation, however trivial or usual they might seem to the individual manufacturer working on his own account and answerable to no one but himself and therefore free to take any risk he might choose, are of material consequence in the situation of these trustees charged with official responsibilities and answerable to the beneficiaries for their stewardship. The changes affect the burden of their labors and may increase their

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responsibilities, and call for a line of procedure into which as trustees they should not enter.

In considering this case we must not lose sight of the fact that the testator never desired nor intended that this property should be a part of the trust fund, but on the contrary expressly directed that it should not be; that he was thoroughly acquainted with the nature of the business, the liability to lose as well as the chance for profit, and the skill required in its management, that the considerations urged by the guardian why the property should remain in the trust do not appear to be founded so much upon financial principles as upon her belief that if the business can be held for her sons or one of them it will be better for them to have it as an incentive to honorable employment than to have no such incentive, that it is not at all certain that either son will have the capacity to carry on the business successfully, that there are four beneficiaries, of whom two are girls with respect to whom there is no such reason why the property should be kept, that to carry on the business is totally inconsistent with the general principles of law as to trust investments, and that the securities comprise more than one half in value of the fund.

Viewed in this light it is not to be supposed that the decree of the Probate Court is to be construed as meaning that the property should be held by the trustees and the business should be carried on in the manner described in the agreement until there should be such changes in the situation as would seem to a business man sufficient reason to sell out or discontinue. On the contrary the change at least need be no other than would tend to increase the unfitness of the property for trust investment and the impropriety of carrying on the business as such. Measured by such a standard it is seen that upon the findings of the single justice, all of which are warranted by the evidence, the changes in the situation are not only material but they indicate with reasonable certainty that the property, or at least a part of it, should be sold.

2. During the trial several motions were made by the defendants and some questions arose concerning the admission of evidence. "So far as [they] are material to said decree" they are reported by the single justice.

The motion to strike out the admission in the answer that the

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compromise agreement of 1908 was unworkable was rightly denied within the discretion of the court. Upon the whole record we think, for reasons therein stated by the single justice, that the discretion was wisely exercised. Moreover the defendants were not harmed by the denial of the motion.

While the petition for the removal of the trustees might have been heard with this bill, yet it was not so closely allied to the real question whether the securities should be sold and the business wound up as to make such action essential for purposes of justice. We cannot say that in declining to hear that case in connection with the present case the justice wrongly exercised his discretion.

During the trial the single justice thought that the main question was whether the securities should be kept. To this general attitude of the court the counsel for the defendants objected and many times attempted to introduce evidence, some of which he contended was admissible even upon the narrow issue stated by the court, and some upon a broader issue. Much of this evidence was excluded. It is unnecessary to go into details. Upon a careful inspection of the record we do not see that the defendants have any reasonable ground of complaint.

3. The remaining questions respect the nature and form of the decree. Was it a final or an interlocutory decree? It is styled a final decree in the record. It appears to have been entered as such, and the appeal is not from an order for the decree but from the decree itself, and the justice who made it thought it was a final decree. Whatever may be the rule elsewhere, according to our equity practice, which is regulated largely by statute, there can be no report of a case upon an appeal from a final decree which has been formally entered. The appeal from such a decree may come to this court as such with or without a report by the justice who made the decree, not of the case but only of the material facts found by him, but in no other way. Where, however, there has been only an order for a final decree and the decree has not been formally entered, the order may be regarded as in the nature of an interlocutory decree and the questions arising thereon may be brought here by report, as in the case of any other interlocutory decree. If this was a final decree it could not come here by report.

"No decree is a final one, which leaves anything open to be

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decided by the court, and does not determine the whole case." Gray, C. J., in *Forbes* v. *Tuckerman*, 115 Mass. 115, 119. Measured by this test this was not a final decree. It provided for further action on the part of the court, namely, that the "terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a single justice of this court." * As an interlocutory decree it is properly before us. R. L. c. 159, §§ 23, 27.

The motion that the decree be restricted to the order of sale of the securities † was rightly denied. No trustee should be personally interested in the sale, it is true, but whatever may be said of any past agreement for sale the presiding justice found as a fact that none of the trustees had such personal interest in any of the negotiations for or proposed sale of the securities as disqualified him from acting loyally and to the best of his ability for the trust in making the sale. He declined to consider the charges against the general ability or inclination of the trustees to act as trustees ought to act in such a matter. While he confined the inquiry to rather a narrow scope, yet in view of the situation at the time the motion was made and the further fact that any sale made by the trustees must be subjected to the approval of the court, we see no reason to declare his discretion wrongly exercised in denying the motion.

The plaintiffs' motion that a paragraph be inserted in the decree "to the effect, in substance, that the price at which the securities should be sold should be determined finally and without right of appeal by any party by decree of a single justice" was rightly

* The portion of the decree referred to was as follows:

"Second. That the trustees proceed to negotiate at a fair price a sale of said securities or such proportion of them as will reduce the amount held by the trustees to such comparatively small amount as would be a reasonable investment of trust funds under the terms of said will; and that the terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a single justice of this court."

† The motion also prayed "that no decree be entered authorizing the trustees to conduct the negotiations or accomplish the sale, until full inquiry and investigation shall have been made as to the capacity and fidelity of the trustees in the discharge of their duties or the personal interest of them, or any one of them, in the proposed sale, antagonistic to the interests of the trust."

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denied. However desirable such a provision might be in the interest of the parties, both trustees and defendants, it cannot be inserted. Whatever jurisdiction the single justice has over this matter he has it as a justice of this court, and by statute any party aggrieved by any order or decree in equity, whether interlocutory or final, made by a single justice, may appeal to the full court. R. L. c. 159, §§ 19, 25.

There must be, therefore, a decree for the sale of at least some portion of the property; and the question remains as to what is the most practical and sensible form the decree should take. It is not to be assumed that the property cannot be sold at a fair price. It is a "going concern" and not peculiar in character. The business is of long standing and appears to have a good name. There would seem to be no good reason why individual capital seeking an investment should not be attracted to it. It is, however, a large concern, and for that reason it may not be easy to find purchasers at once. And there may be an honest difference of opinion among those who propose to sell and those who think of buying as to what is a fair price.

The sale should be made irrespective of the personality of the trustees, — should be made by the trustees for the time being. It does not seem necessary that all the securities should be sold. We think, however, that the stock both common and preferred should be sold. The bonds, although amounting to a large sum, are apparently amply secured and need not be sold now.

For these and other reasons which need not be set forth in detail, the majority of the court are of opinion that the decree made by the single justice should be modified according to the order accompanying this opinion.

Decree for the plaintiffs.

NOTE. The order above referred to was as follows:

"First: That the securities and obligations of S. Slater & Sons, Incorporated, a Massachusetts corporation owning a manufacturing property, now held by the trustees, or, at the discretion of the trustees, only the stock, common and preferred, of said corporation so held by them, be sold, such sale to be negotiated by the trustees for the time being.

"Second: That the trustees proceed to negotiate at a fair price a sale of said securities, or at their discretion, only the said stock, and that the terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a justice of this court, provided, however, that no such

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sale shall be so approved if the guardian for the time being shall file in court her written objection to its terms.

"Third: That if on or before the first day of January in the year nineteen hundred and thirteen no valid and final sale of said stock shall have been made and approved under the second clause of this decree, then on or before the first day of April in the same year the securities, or at the discretion of the trustees only the stock, shall be sold at public auction to the highest bidder, the upset price and the other terms to be settled by a single justice."

MORTON, J. I regret that I am unable to agree with the opinion. But I do not think (first) that a sale should be ordered, and I do not think (secondly) that if there is to be a sale the present trustees should be authorized, as the case stands, to make it.

I take up the second objection first. When the case came on for hearing the defendants filed a petition for the removal of the trustees, alleging amongst other things as grounds of removal unfaithfulness and incompetence, and moved that the petition be heard with the bill of the trustees for instructions. This motion was denied and the case proceeded to a final hearing on the bill filed by the trustees. The petition for removal is still pending and has not been passed upon. The presiding justice, now the Chief Justice, filed a memorandum of decision directing that a decree should be entered ordering a sale of a part of the securities by the trustees. After the filing of the memorandum of decision and before the entry of a decree the defendants filed a motion or petition that the decree when entered be limited to a sale of the securities, averring that the trustees were unsuitable persons to have charge of the sale, and alleging amongst other things that one of them, Smith, had a personal interest in the sale of the securities. A hearing was had upon this motion or petition. At the hearing the presiding justice restricted the evidence to the question whether any of the trustees had such personal interest in the proposed sale of the securities as to disqualify them, and limited the time to be covered by such inquiry to a period between April 10, 1910, and the date of the hearing, which was on February 10, 1911. It appeared during the hearing on the bill for instructions that one of the trustees was totally incapacitated from attending to his duties as trustee, and that the time of another had been so taken up by public duties during the last two years that he had been able to give little or no attention to the affairs of the

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trust. It also appeared, or there was evidence warranting a finding, that the other trustee, Smith, had been engaged on one, if not two, occasions in negotiations with Kidder, Peabody and Company for a sale of the manufacturing business and property to a new corporation to be organized by them, in which he was to be financially interested and of which he was to be the manager at a salary of $25,000 a year. These negotiations fell through on account of the opposition of Mrs. Slater. It did not appear that she knew at the time of Smith's personal interest in them. There was also testimony tending to show that Smith had proposed to Mrs. Slater that he should be put in as general manager of the manufacturing business and property, at a salary of $25,000 a year, and that she declined to agree to the proposition, and that after that he again took up negotiations with Kidder, Peabody and Company for a sale of the property. It would not be an altogether unwarrantable inference that if Mrs. Slater had agreed to the proposition made by Smith this bill for instructions never would have been heard of. The presiding justice found that none of the trustees had any such interest in the proposed sale as to disqualify them, and a decree was entered as already observed directing the trustees to sell a part of the securities. The majority opinion affirms the decree with some modifications. The result will be, if the decree stands, that the sale will be put into the hands of persons of whom one is totally incompetent to act, another has given no attention to the manufacturing business for two years, and the third has heretofore been engaged in negotiations for a sale of the property in which he was to have a pecuniary interest. The decree will also have been entered while a petition for the removal of the trustees is pending, which the defendants have tried without success to have heard. Without imputing any want of probity to any one, it seems to me that the mere statement of the situation is enough to show that if a sale is to be made these trustees ought not to be the ones to make it. The provision in the decree that a sale may be made with the consent of the guardian does not materially change the situation. The defendants are entitled to have the affairs of the trust administered by three trustees all competent and faithful. They are entitled to have the sale, if there is to be a sale, conducted by such trustees. The finding that none of the trustees is disqualified by

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reason of personal interest in the sale which is now proposed is far from settling the question whether the sale should be committed to them. I think that the petition for removal should have been heard in conjunction with the bill for instructions by the trustees, or that action on that bill should have been postponed until the petition for removal had been heard and passed upon. I also think that if the petition in regard to limiting the decree was to be heard at all, the defendants should not have been restricted as they were either in respect to the issue to be tried or the time to be covered by the evidence, but should have been allowed to go into all matters affecting the competency and faithfulness of the trustees, subject only to those general rules by which courts in the exercise of their discretion regulate the conduct of trials. Where matters affecting the competency and faithfulness and suitability of trustees are involved, the scope of the inquiry should not be narrowed, but every opportunity consistent with the rules of law should be allowed to investigate the charges that are made.

I pass to the merits, strictly so called, namely, whether a sale should be ordered, though the matters to which I already have referred seem to me materially to affect the defendants' rights.

The property in the hands of the trustees, including the three millions of which the widow has the income for life, amounts to upwards of fourteen millions of dollars. This is all to be divided ultimately among the four children. Upwards of eleven millions of dollars of this is held by the plaintiffs upon a trust which will end July 12, 1920, and which has therefore only a little more than eight years to run. The oldest child is upwards of eighteen years of age, or was at the date of the hearing on the bill. The next, a boy, was between seventeen and eighteen years of age, and the other two were fifteen and twelve years of age respectively. The securities which are the subject of the bill represent the cotton and woollen manufacturing business with its accumulations since Mr. Slater's death, in which Mr. Slater was engaged when he died, and which had been in the Slater family for a hundred years. The business was carried on by Mr. Slater with great success, and it has been carried on with great success by the trustees during the eleven or twelve years that they have carried it on since Mr. Slater's death. The trustees have expended out of the

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profits of the business large sums in keeping up the property and adding to it, and everybody agrees that the manufacturing properties are now in a much better condition than when Mr. Slater died. Large sums, it is said, will have to be spent in the near future for improvements and additions. But the undisputed testimony shows that the expenditures when made will add proportionately to the value of the property and will yield a satisfactory return and will put the property in shape to compete successfully with other concerns. If it should be necessary to borrow there is not a scintilla of evidence to show that there will be the slightest trouble or risk in borrowing on the credit of the corporation all that may be needed. The trustees have borrowed large sums and repaid them without difficulty. The guardian, who is the widow, and the children, who, as I have said, are the parties amongst whom the property is ultimately to be divided, are strongly opposed to the sale. The eldest son, who will soon be of age, is anxious to take up and carry on the business which his father and others of the family before him have carried on. The proposed sale will prevent him from doing so, or at least will have the effect of taking away to a large extent the inducement to do so, since it will operate to transfer the business to other hands and will put an end to the control of the Slater family over it. Reduced to its last analysis the reason for ordering a sale of a part or all of the securities is that if the trustees keep them and continue to carry on the business the estate may suffer a loss. It would seem that if, with an estate of upwards of fourteen millions of dollars to be finally divided amongst them, the beneficiaries, because of family pride or because they believe that the investment is a good one, desire that the securities should be kept and the business carried on as it has been, their wishes should be respected. They can amply afford any loss which they may sustain. No rule of law requires that the securities should be sold and the business disposed of. The case is not one for the application of the rules of law relating to the investment of trust estates. The effect of the decree of the Probate Court confirming the compromise agreement of 1908 was to authorize the investment in these securities. The will was modified by that agreement and the terms of the trust were thenceforward to be found in the will as modified by the agreement. The decree of the Probate

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Court was not appealed from and full force and effect must be given to it. It is not attempted to raise a question respecting its validity. It is too late to raise any such question. Even if it were not, its validity cannot, it seems to me, be successfully attacked. By means of the compromise agreement the trustees procured a full and final settlement of their probate accounts and became entitled thereby to retain sums which they had charged for their services during the three years when it turned out that they were in fact acting as administrators with the will annexed, though everybody interested supposed they were acting as executors and that the will had been duly proved and allowed, which sums so charged trebled in amount the compensation given them as executors in the will. Justice and fair dealing require that the plaintiffs should be held to the agreement of 1908, and should be compelled to carry it out in good faith. That agreement was intended as a final settlement of all differences between the parties. It was also intended to provide for carrying on the business permanently. That appears upon the face of the agreement itself. In addition there was evidence of statements by Smith and Washburn to that effect. Bartlett, the other trustee, was unable to testify. Leave was reserved in the concluding clause to any of the parties to apply to the court for a sale of the securities as the facts warranted it. There are no facts, in my opinion, which warrant this application for a sale of the securities. Nothing has occurred since the agreement was entered into which was not reasonably to be anticipated, or which must not be deemed to have been within the contemplation of the parties when they entered into the agreement. Any other conclusion would attribute to the trustees a shortsightedness which in view of their experience and ability would be preposterous. The uncertainties attending the business will be no greater in the future than they have been in the past. It is said that the scheme contained in the agreement for carrying on the business has become unworkable and the presiding justice so found, relying in part at least upon an alleged admission in the answer to that effect after he had refused the defendants leave to amend, which, it seems to me they ought to have been allowed to do, though I agree that the matter was within his discretion. I think that the presiding justice and the majority of the court construe the alleged admission much too

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broadly. What the answer says is this: "These respondents admit the allegations contained in the fourteenth paragraph [which is the paragraph that alleges that the plan has become unworkable] . . . and insist that the reason that the compromise agreement of 1908 has become unworkable is due entirely to the fault of the petitioning trustees and to their failure to keep the promises to the testamentary guardian . . . which were the basis of and inducement for the execution of said agreement." The fair construction and implication of this is, it seems to me, not that the scheme contained in the agreement can no longer be carried out, but that it has become unworkable because the trustees have not done what they ought to do and that if they do what they ought to do there will be no difficulty. No one can contend that in and of itself the scheme for carrying on the business is not workable. There has been no such change in manufacturing conditions generally or at the mills operated by the plaintiffs as to render it impossible to carry out the scheme as it was intended to carry it out. Nothing, it seems to me, but the most cogent reasons and the most insuperable objections can justify the court in declaring that an agreement deliberately entered into as this was for the purpose of settling all differences and providing a method for continuing the business, and which has been approved by the Probate Court and now constitutes a part of the terms of the trust, is no longer binding and workable. The fact that there has been friction between the guardian and trustees is no reason for pronouncing the agreement unworkable and ordering a sale of the securities. If all of the trustees had been in a condition to attend to the business of the trust and had done so, it is possible that there would have been no friction or that it would have been reduced to a minimum. As it is, the active management of the manufacturing business has devolved practically upon one trustee. Under such circumstances it is unjust, it seems to me, to pronounce the agreement unworkable.

As I have said, the investment of the trust estate in these securities was in effect approved by the decree of the Probate Court confirming the compromise agreement. Whether the securities, or a part of them, shall be sold does not depend therefore on whether they are a proper investment for trust funds. The parties have agreed, notwithstanding the will, to the investment,

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and the agreement has received judicial sanction. Neither does the question of risk to the trustees arising from a continuance of the investment and the carrying on of the business enter into the matter at all. The agreement contemplates that the business shall be carried on and expressly provides that the liability of the trustees shall be only that of directors in manufacturing corporations, thus relieving them from liability as trustees.

The will authorized the executors to carry on the manufacturing business until it could be wound up without serious loss, and gave directions for the investment of the proceeds. Purporting to act under and by virtue of the authority thus given, the parties named as executors carried on the business till 1903, when pursuant to a decree of the Probate Court they caused a corporation to be formed of which they elected themselves directors and to which they conveyed the manufacturing property and business, receiving therefor the securities in question. This was done without objection from the beneficiaries. Since 1903 the business has been carried on by the executors and trustees as directors of the corporation thus formed. It may well be doubted whether there was any warrant in law or authority in the will for what has thus been done. This was the situation when the compromise agreement of 1908 was entered into. The effect of that was to modify the will and to create a status which was to continue indefinitely, though not longer of course than the trust, subject only to the proviso that any of the parties might apply to the court at any time, as the facts warranted, for a sale of the securities. The fair construction of this is that the status established by the agreement is to continue until it is apparent that by reason of changes in family, business or other matters affecting the estate or the beneficiaries which have occurred since the agreement was entered into, it is no longer for the best interests of all concerned that the business should be continued as provided. It should clearly appear that the best interests of all concerned require a sale in order to warrant one. It is not sufficient that there may be some hazard in continuing the business, or that the investment is one that ordinarily would not be sanctioned. Those questions, as I have said, are foreclosed by the agreement and its approval by the Probate Court. The question is not whether this is a proper investment for trust funds as the presiding justice in effect ruled,

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but whether there have been such changes since 1908 as, taking all the circumstances into account, require a sale of these securities and the giving up of the business. In passing upon that question not only is the financial aspect to be considered, but regard is to be paid to laudable family pride and honorable ambitions on the part of the beneficiaries and the widow and guardian, and to what will tend to promote the mental and moral welfare of those for whose benefit the plaintiffs hold this estate. Their support and maintenance in a style befitting their fortunes is abundantly secured. The size of the estate is also to be taken into account, and what might not be proper in a small estate may well be deemed unobjectionable in an estate of the magnitude of this. Giving to these and other considerations which should be taken into account the weight to which they are justly entitled, it does not seem to me that a case for a sale has been made out. No case has been cited, and I think that none can be found or it would have been cited, in which a sale has been ordered against the objection of the beneficiaries where the circumstances at all resembled those in this case. Indeed, I am not aware of any case in which a change of an investment permitted by the terms of the trust has been ordered against the objection of those ultimately entitled to the trust estate, nor in which a finding in favor of a sale has been based, as here, largely on the testimony of trustees whose competency and faithfulness are in dispute and still undetermined.

Mr. Justice Braley concurs in this opinion.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Morton, Hammond, Braley, & Rugg*, JJ., and afterwards was submitted on briefs to all the justices then constituting the court.

J. R. Thayer & S. L. Whipple, (*A. Lincoln* with them,) for the defendants.

H. Parker & T. H. Gage, for the plaintiffs.

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JOSEPH B. F. JOHNSON & another *vs.* MARY HOLLAND, executrix.

Suffolk. November 13, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Agency, Broker's commission. *Broker*. *Contract*, Performance and breach.

In an action by a broker for a commission for procuring a purchaser for certain real estate of the defendant, if the plaintiff shows that he procured as a purchaser a person with whom the defendant made a contract in writing for the sale of the real estate in question, it is not necessary for the plaintiff to prove further that the proposed purchaser was able, ready and willing to perform his part of the contract, the defendant having accepted him as a purchaser by entering into the contract in writing with him and the plaintiff's commission having been earned when the contract was made.

CONTRACT by the members of a firm of real estate brokers for $562.50 alleged to be due to the plaintiffs as a commission for procuring a purchaser for certain real estate of the defendant's testator, who was the original defendant, on Ocean Avenue in Revere. Writ in the Municipal Court of the City of Boston dated July 23, 1909.

On appeal to the Superior Court the case was tried before *Hardy*, J. The contract in writing for the sale of the real estate in question, which is referred to in the opinion, was executed under seal by the defendant's testator as the seller and by one Samuel Freudenburg as the purchaser. There was no evidence in regard to the financial standing of Freudenburg and no evidence of an offer of performance on his part.

Among the rulings requested by the defendant was the following: "That the plaintiffs must prove that the alleged purchaser Samuel Freudenburg was willing, ready and financially able to purchase the said property of the defendant at the terms agreed upon between said Freudenburg and the defendant, and, failing so to do, the verdict must be for the defendant." The judge refused to make this ruling, as well as other rulings requested by the defendant, the questions raised by the other rulings being disposed of by the verdict of the jury, as stated in the opinion.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

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The case was submitted on briefs.

C. B. Loud & H. Dunham, for the defendant.

F. J. Slattery & C. J. Wing, for the plaintiffs.

HAMMOND, J. This is an action of contract wherein the plaintiffs as real estate brokers seek to recover a commission for the sale of real estate belonging to the original defendant. The latter having died since the action was brought, the executrix defends. The jury found for the plaintiffs, and the case is before us upon exceptions to the refusal of the presiding judge to give certain rulings requested by the defendant and to the rulings given.

So far as respects the defense of the mental incapacity of the defendant's testator to understand the agreement with Freudenburg the proposed purchaser, and also the defense of fraud, the defendant has no ground of complaint. The evidence on each of these points was conflicting and would have warranted a finding either way. And the jury were distinctly told that if there was any fraud practised by the plaintiffs upon the defendant's testator either as to the tenor of the agreement or to induce him to sign it, or if he signed it under such a degree of mental incapacity as to prevent him from comprehending what he was doing, then the verdict should be for the defendant.

The defendant's testator having accepted the proposed purchaser by entering into the written contract of sale with him, it was not necessary for the plaintiffs to prove at the trial that the purchaser was able, ready and willing. When the valid written contract was executed the commission of the plaintiffs was earned. *Roche* v. *Smith*, 176 Mass. 595, 597, and cases cited. The plaintiffs were not obliged to go further.

The charge of the presiding judge sufficiently covered the question of double commission. Under the charge the jury must have found that at the time the contract of sale was signed there was no agreement on the part of the proposed purchaser to pay the plaintiffs any commission for any purpose whatever. See *Alvord* v. *Cook*, 174 Mass. 120, for a discussion of the law on this subject.

We see no error in the manner in which the judge dealt with the requests, and the charge was full and correct.

Exceptions overruled.

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MARK STONE, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 13, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, Street railway.

A man sixty-three years of age, who in crossing a city street in broad daylight at a place where there is nothing to distract his attention sees a street car, which could have been seen for a distance of at least five hundred feet, rapidly approaching, and deliberately attempts to cross in front of it when very near and is struck by the car, is negligent as matter of law.

TORT by the administrator of the estate of Asher S. Stone for causing the death of the plaintiff's intestate as stated in the opinion. Writ dated December 18, 1907.

In the Superior Court the case was tried before *Morton*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. K. Cohen, for the plaintiff.

E. P. Saltonstall, for the defendant.

HAMMOND, J. While crossing the tracks of the defendant on Washington Street in this city, near Guild Street, about nine o'clock in the forenoon of August 3, 1907, the plaintiff's intestate, a man then sixty-three years of age, was struck by a car and killed.

The accident occurred in broad daylight. There is no evidence that the deceased received any invitation from the defendant or any one else to cross, nor that there were any other vehicles to complicate the situation or to distract his attention at the precise time of the accident. Nor was there anything to shut off the view of the car for at least five hundred feet from the place of the accident. There was no wind or rain to interfere with his view or to distract or require his attention; nor does it appear that he became suddenly confused. If the witnesses for the plaintiff are to be believed, the intestate, seeing a rapidly moving car approaching, deliberately attempted to cross when it was so near that the attempt was rash in the extreme. The case falls far short of showing due care on his part. It is clearly distinguishable from

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Albee v. *Boston Elevated Railway*, 209 Mass. 6, upon which the plaintiff relies, and it must be classed with *Haynes* v. *Boston Elevated Railway*, 204 Mass. 249, and similar cases.

Exceptions overruled.

ELIZABETH H. WEBBER *vs.* SARAH A. W. BENBOW.

Norfolk. November 14, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, SHELDON, & DECOURCY, JJ.

Husband and Wife, Unlawful enticement, Loss of consortium. *Alienation of Affections*. *Evidence*, Of unlawful enticement.

A declaration, in an action by one woman against another, which alleges that the defendant, intending to injure the plaintiff, unlawfully gained the affections of the plaintiff's husband and enticed him to leave the home of the plaintiff and to continue absent from it, "whereby the plaintiff lost the comfort, society, aid, assistance and support of her said husband and his affection for the plaintiff was wholly alienated and destroyed," states a cause of action for loss of consortium.

In an action, by one woman against another, for wrongfully enticing away the husband of the plaintiff, evidence was admitted, against the exception of the defendant, of familiar and suspicious conduct of the defendant with the plaintiff's husband in the defendant's bedroom. The plaintiff's counsel disclaimed any suggestion of adultery and offered the evidence as bearing on the defendant's "mental attitude." *Held*, that the evidence was admissible, even if it tended to show adultery and if adultery was not charged in the declaration, because, if believed, it tended to throw some light on the methods of enticement used by the defendant and also upon her motives.

TORT for the wrongful enticing away of the plaintiff's husband and the alienation of his affections as alleged in the declaration, which is quoted in the opinion. Writ dated January 18, 1909.

In the Superior Court the case was tried before *Sherman*, J. The defendant excepted to the admission of certain evidence described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. On the pleadings, as a matter of law, this action for the enticement of the plaintiff's husband by the defendant cannot be maintained.

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"2. In the case at bar there is no allegation in the declaration that there was a loss of consortium by the wife, and no allegation of the husband's adultery, hence, as a matter of law, this action cannot be maintained.

"3. Upon all the evidence in the case the jury must return a verdict for the defendant."

The judge refused to make any of these rulings. The defendant then asked for three instructions to the jury in regard to the giving of advice to the plaintiff to leave her husband. The first of them was given by the judge and the other two were dealt with in the judge's charge and are not material to the questions argued by the defendant.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal of the rulings and instructions requested by her and to certain portions of the judge's charge.

The case was submitted on briefs.

H. H. Pratt, for the defendant.

G. G. Darling, for the plaintiff.

HAMMOND, J. The plaintiff's declaration is as follows: "And now comes the plaintiff in the above entitled action and for declaration says that the defendant contriving and wrongfully intending to injure the plaintiff and to deprive her of the comfort, society, aid, assistance and support of George H. Webber, the husband of the plaintiff, and alienate and destroy his affection for her, unlawfully and unjustly gained the affection of her said husband, and persuaded, procured and enticed her said husband to leave the home of the plaintiff, and to continue absent from the same, by means of which persuasion and enticement he did continue absent for a long period of time and up to the bringing of this suit, whereby the plaintiff lost the comfort, society, aid, assistance and support of her said husband and his affection for the plaintiff was wholly alienated and destroyed, all to her great damage as she saith in her writ."

"In this Commonwealth, alienation of affections alone is not a substantive cause of action . . . but is merely an aggravation of damages, for the loss of consortium," says Lathrop, J., in *Neville* v. *Gile*, 174 Mass. 305, 306, citing *Bigaouette* v. *Paulet*, 134 Mass. 123; *Evans* v. *O'Connor*, 174 Mass. 287. See also *Lellis* v. *Lambert*, 24 Ont. App. 653. Relying upon this rule the defendant insists

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that this declaration, like that in *Neville* v. *Gile*, alleges as the substantial cause of action alienation of affections. This position is untenable. The declaration is in the usual form for loss of consortium, and clearly sets out that loss as the cause of action. An examination of the original papers in the case of *Hadley* v. *Heywood*, 121 Mass. 236, discloses the fact that the form of the second count in that case is, *mutatis mutandis*, identical with the declaration in the present case except that this declaration is strengthened by the addition of the word "support" after "assistance." And this court has said that in the second count in *Hadley* v. *Heywood*, "loss of consortium was properly charged." *Neville* v. *Gile*, *ubi supra*. See also in addition to cases above cited, *Tasker* v. *Stanley*, 153 Mass. 148, and *Nolin* v. *Pearson*, 191 Mass. 283, for a discussion of the general subject. The present case is clearly distinguishable from cases like *Neville* v. *Gile*, *ubi supra*, and *Houghton* v. *Rice*, 174 Mass. 366, cited by the defendant.

The evidence as to the familiar and suspicious conduct of the defendant with the plaintiff's husband in the defendant's bedroom was properly admitted. It is to be noted that the plaintiff's counsel expressly disclaimed any suggestion of adultery or debauchery on the part of the defendant, and offered the evidence only as bearing on the defendant's "mental attitude." But it was admissible even if it tended to show adultery. If believed, it had a tendency to throw some light upon the methods of enticement used by the defendant, and also upon her motives. And this is so even if adultery was not set out in the declaration. Nor do we see that the defendant has any just ground of complaint as to the manner in which the presiding judge treated this matter in the charge to the jury.

Exceptions overruled.

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MARY A. GALLAGHER *vs.* MARY HUSSION.

Suffolk. November 15, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Deceit.

An allegation in a declaration that the defendant falsely and fraudulently represented that she desired to purchase the plaintiff's lodging house business for $600, relying on which the plaintiff suffered loss, is too indefinite and too remote to sustain an action of deceit.

TORT for alleged deceit, changed from a bill in equity by an amendment filed and allowed on December 19, 1910.

The defendant demurred to the declaration and, after an amendment by the plaintiff, demurred to the declaration as amended. The allegations, which, it was assumed in favor of the plaintiff were contained in the declaration, are stated in the opinion.

The case was heard upon the demurrer by *Pierce*, J., who sustained the demurrer and ordered judgment for the defendant. From the judgment entered in pursuance of this order the plaintiff appealed.

E. M. Shanley, for the plaintiff.

E. A. Howes, Jr., for the defendant.

HAMMOND, J. Even if it be assumed in favor of the plaintiff that the declaration sufficiently avers that the defendant represented to the plaintiff that she desired to purchase the plaintiff's lodging house for $600 and desired to obtain a lease of the house from the plaintiff's landlord, that relying upon such representations and induced thereby the plaintiff procured for the defendant the desired lease, that the representation that the defendant desired to purchase the lodging house for $600 was a false and fraudulent statement of the defendant's desire, which the defendant then well knew, and that the plaintiff has been thereby dispossessed of the house to her great damage, there is nevertheless one fatal objection to the plaintiff's case.

The representation that the defendant desired to purchase the lodging house for $600 was too indefinite and too remote to be a

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material representation. The declaration nowhere avers that the plaintiff would have sold her lodging house for that sum, or that the defendant had agreed to buy it at that price, or indeed at any price. The mere desire of the defendant, standing alone, unconnected with any agreement to purchase and going no further than a desire is an immaterial circumstance, and the plaintiff in relying upon it can gain no cause of action.

Demurrer sustained.

TOM L. HOLDER *vs.* MASSACHUSETTS HORTICULTURAL SOCIETY.

Suffolk. November 15, 16, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability. *Charity.*

In an action against the owner of a building, in which the plaintiff was employed as a general helper, for injuries caused by the fall of an elevator or dumb waiter on which the plaintiff had stepped by direction of a superintendent of the defendant when the superintendent and the plaintiff were engaged in attempting to adjust the lifting cable of the elevator which had run off the wheel and fallen down, if it can be found that, in obedience to a repeated order of the superintendent, relying upon his assurances that such an act was safe and justifiably believing that there were safety devices to prevent the elevator from falling, the plaintiff jumped on the elevator and it dropped to the bottom of the well, there is evidence for the jury that the plaintiff was in the exercise of due care, that he did not appreciate and assume the risk, and that the order of the superintendent was negligent.

A charitable corporation owning a building, which lets a part of the building to a tenant for purposes entirely disconnected with those for which it was chartered, is not exempted from liability for an injury to a man in its employ caused by the negligence of its superintendent when the superintendent and the employee were engaged in doing work for the benefit of the tenant in accordance with the contract of the corporation with the tenant.

TORT by an employee of the defendant for injuries sustained on February 17, 1908, from the falling of an elevator or dumb waiter in the building of the defendant in the manner described in the opinion. Writ dated June 10, 1908.

The declaration contained three counts, the first alleging negligence in allowing the elevator to be in an unsafe and dangerous

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condition, the second alleging negligence of a superintendent, and the third alleging a defect in the ways, works or machinery of the defendant. A fourth count, added by amendment, alleged negligence of a person who in the absence of the superintendent was acting as superintendent.

In the Superior Court the case was tried before *Brown*, J. It was agreed that the defendant was a corporation created by St. 1829, c. 22. The following facts appeared in evidence: The building of the defendant was at the corner of Massachusetts and Huntington Avenues in Boston and was known as Horticultural Hall. One Spry was the engineer of the building and had entire charge of its mechanical parts. The plaintiff "was hired to do janitor work, which consisted of keeping the place clean, sweeping, dusting, scrubbing, cleaning brass work, etc." He was instructed by one Rich, who was the general superintendent of the building and the secretary of the defendant, to take orders from Spry.

A secret society, known as the Order of the Eastern Star, hired for the week beginning February 17, 1908, certain portions of Horticultural Hall consisting of the large exhibit room, the lecture room, the restaurant in the basement and, in connection with that, the kitchen, which was in the third story. On the morning of February 17 the caterer in charge of the kitchen wished to have some tables brought up, and asked Spry to send up some tables. Spry thereupon said to the plaintiff, "Tom, they want a table in the kitchen. Get one up." The plaintiff thereupon got a table eight feet long and three feet wide, and with another man tried to get the table up through some spiral stairs to the third floor. Finding that this was not practicable, they put the table on the elevator or dumb waiter, which was used for the purpose of carrying supplies from the basement to the kitchen. The plaintiff then went to Spry and said, "Joe, we can't get the table up the stairway; I have got it on the elevator," to which Spry replied, "That is all right, Tom. Send it up. Can you do it?" to which the plaintiff replied, "I guess I can." The table was accordingly sent up to the third floor and taken off. A little while after, Spry came to the plaintiff and told him that more tables were wanted, to which the plaintiff replied that he would get them up just as soon as he could. The plaintiff and another man then got more

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tables and put one on the elevator in the same manner that they had put the first one on. When they went up to take the table off, it was found that something was wrong with the elevator, and the plaintiff went to see what the trouble was. He saw that the lifting cable of the elevator had parted from the cross beam at the top of the elevator. The cable had run off the wheel and fallen down toward the platform of the motor so that it hung down the well. Spry then came upstairs and the conversation between him and the plaintiff occurred which is quoted in the opinion, followed by the accident as there described.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant, and reported the case for determination by this court, with a stipulation of the parties, that, if the ruling was right, judgment was to be entered upon the verdict; but that, if the ruling was wrong, judgment was to be entered for the plaintiff in the sum of $2,500.

D. E. Hall, for the plaintiff.

E. K. Arnold, (*W. B. Luther* with him,) for the defendant.

HAMMOND, J. This is an action of tort brought by an employee of the defendant to recover for injuries received by reason of the fall of an elevator or dumb waiter in a building owned by the defendant, upon which the plaintiff had stepped for the purpose of making repairs.

The evidence tended to show that one Spry was a superintendent and that his principal duty was that of superintendence; that by reason of the violent contact of a table, while being carried up upon the elevator, with the top of the elevator well, a rope holding the elevator parted and as thus disabled the elevator was at the third floor; that the plaintiff and Spry saw that the rope had parted and that Spry determined to repair it. As to the accident the plaintiff testified that he said to Spry, "Hold on, Joe, while I run down the stairs and up the ladder to the motor platform; I can pass the end of the cable up to you from there;" that Spry said, "It is all right, Tom (referring to the plaintiff). Jump on the car. It will be all right;" that he (the plaintiff) hesitated; that Spry said, "Jump on the car it will be all right." The plaintiff then jumped on the car and it immediately dropped to the bottom of the well. The evidence tended further to show that the plaintiff believed and had reason to believe that there

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were safety devices to prevent the elevator from falling and that he stepped upon the elevator in reliance upon the assurance by Spry that such an act was safe. Under all the circumstances the jury would have been justified in finding that the plaintiff was in the exercise of due care, that he did not appreciate and assume the risk, and that the order was negligent

There was therefore a case for the plaintiff, at least upon the second count of his declaration, unless the defendant is saved by the law relating to charitable corporations as set forth in a long line of decisions in this Commonwealth. See *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; *Farrigan* v. *Pevear*, 193 Mass. 147, and cases cited. But we do not think it can be thus relieved. Even if it be assumed that the defendant is a charitable institution within the meaning of the term as used in this branch of the law, still there is one fatal flaw in its case.

The defendant had let that part of the building where the accident occurred, to a tenant for purposes entirely disconnected with those for which the defendant was chartered. The business of the tenant was not charitable. Moreover at the time of the accident both the plaintiff and Spry by the authority of the defendant were engaged exclusively in assisting the tenant, or rather in carrying out the contract made with the tenant by the defendant. It is entirely immaterial that the money received for rent was to be applied to the general charitable purposes of the society. At the time of the accident the work in progress was in no way connected with charity, even in its more liberal sense, and the rule of exemption invoked by the defendant is not applicable.

Judgment for the plaintiff for $2,500.

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CATHERINE CRAFT *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 17, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Street railway, *Res ipsa loquitur. Evidence,* Presumptions and burden of proof.

In an action against a corporation operating passenger cars in a tunnel, for injuries caused by a sliding door of a car of the defendant closing by mechanism upon the plaintiff while she was in the act of entering the car, which was standing for the reception of passengers at a station, if there is no explanation whatever of the cause of the movement of the door, its closing upon the plaintiff is *prima facie* evidence of negligence, although it was possible for some passenger to have started the machinery by which the door was closed.

It is the duty of a corporation operating passenger cars in a tunnel, not only to use care to see that its servants manage properly the machinery for closing the sliding doors of its cars by which the passengers enter, but also to use care to see that no stranger starts the mechanism so as to cause injury to a passenger.

TORT for personal injuries caused by the closing of a door of a car of the defendant upon the plaintiff as she was entering the car as a passenger in the Court Street station of the East Boston Tunnel. Writ dated June 3, 1908.

In the Superior Court the case was tried before *Morton,* J. It was admitted that the plaintiff was in the exercise of due care, and attempted to board the car as a passenger at a point where the car stopped for that purpose. The Court Street station is the Boston terminal of the East Boston tunnel. At this point there is a single track, and the cars come to a stop at what is known as a "dead end." In each car there are four doors, two on either side, front and rear, and the doors all are opened at the Court Street station for the purpose of allowing incoming passengers to alight and returning passengers to enter the car. At the time passengers are alighting and other passengers are entering, the conductor and motorman are engaged in reversing their positions, and the doors of the car then are closed preparatory to the return trip over the same track. The two doors on either side for the reception and exit of passengers slide directly back into the side of the car and are operated by compressed air, through the con-

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trol of small levers on either side of the motorman's post at each end of the car. There are four of these levers at each end of the car, two on each side for the front and rear doors respectively, the car being made to run with either end as the front.

The evidence in regard to the happening of the accident is stated and described in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court. If the ruling of the judge was correct, judgment was to be entered for the defendant; otherwise, by agreement of the parties, judgment was to be entered for the plaintiff in the sum of $850.

A. E. Yont, for the plaintiff.

H. S. MacPherson, for the defendant.

HAMMOND, J. The only question is whether there was evidence of the negligence of the defendant. At the time of the accident the plaintiff was entering the car by the right hand door which was at the forward end of the car. The door is forty-six inches in width and the aperture is divided in the middle by a perpendicular rod. The door in closing passes outside this rod, leaving a space of about three inches. "The rod is apparently designed as a handhold to steady passengers when entering or alighting from the car, and to separate outgoing and incoming passengers." The plaintiff's evidence, which is not contradicted, was that the car was pretty well filled, she being the last passenger to enter at this door, all the seats being occupied, "and there were a few people standing in the aisle." She was passing to the left of the rod previously mentioned when suddenly, without warning, the door started to close and struck her, pinning her body against this rod. The door starts to close slowly and increases its speed as it acquires momentum. Her head, one shoulder, part of her body and one leg were on the inside, the other shoulder, leg and part of her body being held outside the door. She struggled to free herself and was assisted by passengers to a seat, and did not then, or at any other time, see the conductor, and had no communication with any employee of the defendant. She saw the motorman enclosed within his cab, his back being turned toward her.

There was testimony to the effect that it is possible for a passenger to operate the door by the levers in the rear.

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The car was standing for the reception of passengers, and in attempting to enter the car at the place and at that time the plaintiff had so far entered the car that the defendant owed to her the duty of a common carrier to a passenger. The car, the door and all the levers for moving them were under the exclusive care and control of the defendant. The closing of the door under the circumstances was evidence of negligence, and since the door was under the care of the defendant and since there was absolutely no explanation of the cause for the movement of the door, the negligence was *prima facie* that of the defendant. And that is so even if some passenger might have intentionally started the machinery by which it was closed. It was the defendant's duty not only to use care to see that its servants and agents properly managed the machinery, but also to see that no stranger started the mechanism. The doctrine of *res ipsa loquitur* applies. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Savage* v. *Marlborough Street Railway*, 186 Mass. 203. *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295, and cases cited. See also *James* v. *Boston Elevated Railway*, 201 Mass. 263, and cases cited; *Beattie* v. *Boston Elevated Railway*, 201 Mass. 3, and cases cited; *Rockwell* v. *McGovern*, 202 Mass. 6.

In accordance with the terms of the report the entry must be

Judgment for the plaintiff for $850.

J. MERRILL BROWNE & another *vs.* DELIA C. PHELPS.

Suffolk. November 20, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Attorney at Law. Contract, Validity.

R. L. c. 165, § 45, providing for the punishment by fine or imprisonment, of one who, "not having been admitted to practise as an attorney at law in accordance with the provisions of this chapter, represents himself to be an attorney or counsellor at law, or to be lawfully qualified to practise in the courts of this Commonwealth," applies to such a representation made by a citizen of another State who is a member of the bar of that State, but never has been admitted as

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a member of the bar of this Commonwealth, although he has practised here without objection.

One, who, not having been admitted to practise as an attorney at law in this Commonwealth, but having a partner who is a member of the Massachusetts bar, performs services in violation of the prohibition of R. L. c. 165, § 45, cannot recover for such services, either alone or jointly with the other member of the firm.

Where a party to a suit, believing that two persons in partnership are attorneys at law admitted to practise in this Commonwealth, employs them to represent him in court, and when asked in court who are his attorneys, being still in such belief, names both of them, this is not a "personal nomination in open court" within the meaning of R. L. c. 165, § 47, of one of the persons named, who has not been admitted to practise as an attorney in this Commonwealth, to conduct the case for him, at least as between the client and the person in question.

CONTRACT to recover $675 for professional services alleged to have been rendered to the defendant and $32 for cash disbursements alleged to have been made for and in behalf of the defendant at her request. Writ dated June 18, 1908.

The defendant in a supplemental answer alleged that one of the plaintiffs at the time the services were rendered was not admitted to practise law in this Commonwealth in accordance with the provisions of the Revised Laws and statutes in amendment thereof.

In the Superior Court the case was tried before *Sanderson*, J. The material facts are stated in the opinion. At the close of the evidence, the plaintiffs asked the judge to instruct the jury as follows: "That even though one of the plaintiffs was not a member of the bar of Massachusetts, the other member being a member of the bar of Massachusetts, the plaintiffs can recover, both being partners." The judge refused to give this instruction.

The judge instructed the jury as follows: "For services rendered in contravention of law there can be no recovery, either by the person who rendered them or by him jointly with one who might legally have rendered said services. A person not admitted to the bar cannot recover for services rendered by him as an attorney at law, even if he was in partnership with an attorney at law and he brings suit jointly with said attorney. The license to practise law is personal and enures solely for the benefit of the person admitted so that it is illegal for another person not admitted to practise upon his own account under the license to the person admitted, or in partnership with him; and in case of such partnership the partners can maintain no joint action to recover

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fees or expenses for conducting cases in court if the parties not admitted had no written power of attorney and had not been nominated in open court."

The judge then gave the instruction in regard to a nomination in open court which is quoted in the opinion. He continued as follows: "A nomination in open court at a hearing upon a motion or other preliminary matter in a case would not be sufficient to legalize the conduct of the case before a jury not authorized by a written power of attorney or especially authorized; that is unless the special personal nomination was intended to give the special authority to the attorney to act in the trial of the case.

"In an action for services as an attorney at law, no recovery can be had for services in conducting a case in court rendered by one who is not admitted to the bar, unless he is specially authorized."

After the above instructions were given there was a conference between the judge and counsel, and thereafter the judge further instructed the jury as follows: "It is agreed by counsel for the defendant that the defense of illegality does not apply to the reasonable sum for cash disbursements, if you find there is any such sum due."

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

The case was submitted on briefs.

J. S. Richardson & J. M. Browne, for the plaintiffs.

A. L. Richards, for the defendant.

HAMMOND, J. This is an action by a firm of attorneys, consisting of father and son practising in this State, to recover for services rendered and disbursements made in behalf of the defendant. The main question is whether the transactions were illegal as being in violation of R. L. c. 165, § 45.

This statute so far as material reads as follows: "Whoever, not having been admitted to practise as an attorney at law in accordance with the provisions of this chapter, represents himself to be an attorney or counsellor at law, or to be lawfully qualified to practise in the courts of this Commonwealth, by means of a sign, business card, letterhead or otherwise, shall . . . be punished" by fine or imprisonment.

The senior member of the firm, the father, is a citizen of this

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State and a member of the bar here in good standing, having practised in the various courts of the State and in the federal courts for the past thirty-five years. The junior member, the son, having been educated in this State, became in 1903 a citizen of the State of New Hampshire and was admitted to the bar of that State in June, 1906. Since his admission he has been actively engaged in general practice of the law in the courts of Maine, New Hampshire, Rhode Island, New York and Massachusetts, and also before various federal courts, as a member of the plaintiff firm. He never has been admitted as a member of the bar in this Commonwealth, but has practised here without objection. There is no doubt that in the various ways described in this statute he has represented himself to be an attorney and counsellor at law lawfully qualified to practise in the courts of this Commonwealth. And the question more precisely stated is whether, being a citizen of New Hampshire and a member of the bar of that State but not of this, he is included in the phrase "whoever, not having been admitted to practise as an attorney at law in accordance with the provisions of this chapter."

The section under consideration first appeared as St. 1891, c. 418, and *mutatis mutandis* was substantially in the form in which it now stands. Instead of the words "in accordance with the provisions of this chapter," the words were "in accordance with chapter one hundred and fifty-nine of the Public Statutes." This was the chapter providing for the admission of attorneys and so far as material was substantially the same as R. L. c. 165.

The contention of the plaintiffs is that the son is not among those who are forbidden by § 45 to practise in this Commonwealth. And in support of that contention they argue that the provisions of Pub. Sts. c. 159, in force at the time of the passage of St. 1891, c. 418, as well as those of R. L. c. 165, relate only to citizens or inhabitants of this Commonwealth (Pub. Sts. c. 159, §§ 34, 38; R. L. c. 165, §§ 41, 43), and that the prohibition contained in St. 1891, c. 418, as re-enacted in R. L. c. 165, § 45, relates only to the same class of persons, namely, citizens or inhabitants of the Commonwealth. In a word the argument is that the prohibition is directed only against the citizens or inhabitants of this Commonwealth and so is not applicable to a citizen of New Hampshire.

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The plaintiffs are right in saying that at the time of the passing of St. 1891 and of R. L. c. 165, § 45, no citizen of a sister State could be admitted to practise as an attorney at law of our State courts; but it by no means follows that he could practise as an attorney here without being admitted. The prohibition applies to every person who has not been admitted to our courts in accordance with the provisions of our statute. It in effect divides persons into two classes: first, those who have been so admitted and, second, those who have not. The language of the prohibition is broad enough to include all not embraced in the first class. Such is its plain import and such is the sense of the thing. The interpretation for which the plaintiffs contend would allow attorneys from other States, or even persons not attorneys in any State, provided they did not reside in this State, to hold themselves out here as attorneys duly authorized to practise law in this Commonwealth. Such an interpretation would materially weaken the efficacy of the statute to reach the evil against which it is manifestly directed; it is unreasonable and cannot be adopted.

It is urged by the plaintiffs that it always has been the practice of our courts to permit an attorney from a sister State to appear in a case here as an attorney and, either alone or assisted, to conduct a case. There is no doubt of this practice here, and we have no doubt that in doing this our courts are following a practice generally prevalent throughout the States of this country. But this privilege is not claimed by the attorney nor granted by the court as a matter of right, but it is requested and granted simply as an act of courtesy. And the prohibition contained in the section in question is in no way inconsistent with the practice. See *Ames* v. *Gilman*, 10 Met. 239; *In re Mosness*, 39 Wis. 509.

R. L. c. 165, §§ 41, 43, have been amended by St. 1904, c. 355, but the amendments in no way strengthen the case of the plaintiffs. Whether, as contended by the plaintiffs, these amendments are to be construed as changing in no way the law as to non-residents of the State, or whether, as also contended by the plaintiffs, if they do permit the admission of non-residents they are unconstitutional, we have not found it necessary to consider. In any event the prohibition contained in R. L. c. 165, § 45, remains as before, and applies to all persons not lawfully admitted to be attorneys or counsellors at law in our courts. It follows that

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the junior member of this firm was practising law illegally in this State. For his services thus illegally rendered there can be no recovery by him either alone or jointly with the other member of the firm. *Ames* v. *Gilman*, 10 Met. 239. The instructions of the court upon this point were correct.

There was evidence, although upon this point the evidence was conflicting, that at least in one of the cases wherein the plaintiffs acted as counsel for the defendant she in reply to a question put by the then presiding judge as to whether she had counsel replied, "Yes, J. M. Browne and Son," and it is contended that at least as to that case they had the right to go to the jury under R. L. c. 165, § 47, which provides that a person may act as attorney for a person "if authorized by personal nomination in open court." Upon this branch of the case the court instructed the jury as follows: "If a client believing two persons in partnership to be both attorneys at law admitted to practise in this Commonwealth engages them as such to represent her in court and when asked in court who are her attorneys, names them both, still believing them both to be admitted to practise in this Commonwealth, this would not be a nomination in open court such as would be required to render it legal for one of said persons who was in fact not so admitted and had no written authorization to conduct the case as the attorney for said client."

This instruction was correct. So far at least as the immediate actors are concerned this section is not applicable where the party to the litigation simply selects a person whom he believes and has reason to believe to be a duly admitted attorney at law, but simply where he supposes that the person whom he nominates is so far as respects the suit in hand invested with the powers and rights, and subjected to the responsibilities, of a regularly admitted attorney solely by reason of the nomination. The party making the nomination is fairly entitled to know that the person to be nominated is not an attorney at law in this State, and cannot act as such except by the authority conferred in the manner provided by the statute. We see no error in the other instructions upon this branch of the case.

Although the presiding judge at first charged the jury that the defense of illegality was applicable to the claim for disbursements as well as to that for services, yet subsequently, after a colloquy

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between the court and counsel, he said to the jury that it was agreed by counsel for the defendant that the defense of illegality did not apply to the reasonable sum for cash disbursements; and as to this matter the case was finally sent to the jury with instructions to find for the plaintiffs for any such disbursements if any there were.

It is suggested by the plaintiffs that there was no sufficient withdrawal of the first instruction and that the judge did not sufficiently impress his last instruction upon the minds of the jury. But the matter was simple and it does not appear that the plaintiffs have any just ground of complaint.

Exceptions overruled.

MICHELI SOLARI *vs.* ITALIAN SOCIETY OF COLUMBUS.

Suffolk. November 21, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Fraternal Beneficiary Corporation, By-laws, Benefits. *Waiver.*

A section of the constitution of a fraternal beneficiary corporation, composed of persons of Italian birth and ancestry, was as follows: "Within a year from their admission all members must be supplied with the society uniform . . . otherwise they shall lose all the rights to benefits and may be cancelled from membership." Other sections required the wearing of the uniform by those appointed as pall bearers to represent the society at the funerals of members and by all members taking part in any public parade of the society. *Held*, that it could not be said that the requirement that the members should provide themselves with uniforms was outside the general purposes for which the society was incorporated or that it was unreasonable; *also*, that it could not be said as matter of law that the penalty for non-compliance was too severe.

Under a valid by-law of a fraternal beneficiary corporation requiring that all members must be supplied with the society uniform and that "otherwise they shall lose all rights to benefits and may be cancelled from membership," where another by-law provides that "they shall be punished with suspension of the sick benefit . . . who shall not have the society's uniform," *it would seem*, that so long as a member does not have the society uniform his right to benefits is suspended without any action by the directors. In the present case the member's right to benefits was declared lost by a vote of the directors before the injury by reason of which the benefit was claimed, and such action was not waived by another similiar vote passed after the injury.

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CONTRACT against a fraternal beneficiary corporation, organized under R. L. c. 119, for $136.50 alleged to be due to the plaintiff as a benefit for sickness and disability caused by an injury sustained by him on April 16, 1905, when he was alleged to have been a member of the defendant in good and regular standing. Writ dated June 27, 1906.

The answer, among other matters, alleged that at the time of the plaintiff's injury he was not in good and regular standing in the society and that he had not conformed to the by-laws of the society.

In the Superior Court the case was submitted to *Richardson*, J., upon an agreed statement of facts. Section 18 of the defendant's constitution is quoted in the opinion, where also other provisions of the defendant's constitution are described.

The concluding portion of the agreed statement of facts was as follows:

"The plaintiff has never complied with the requirements of section 18 of the constitution and by-laws of the defendant society. While a member thereof, and prior to the injury sustained by him now subject of this suit as heretofore set forth, and after the expiration of one year from the date of the plaintiff's admission into the defendant society, the plaintiff was called before a meeting of the directors and was requested to forthwith conform with the requirements of section 18 aforesaid by getting a uniform like to the pattern which was then worn and adopted by this society, under penalty, if failing to do so, of losing his right to benefits; that the plaintiff did then and there refuse to so conform with the requirements of section 18; that at a regular meeting of the society thereafter held, but before the injury subject of this suit, and in accordance with a vote then and there taken and passed a committee was chosen to call upon the plaintiff to request him to comply with said section 18, otherwise he should forthwith lose his right to benefits as stated in said section 18, and the plaintiff did then and there refuse to receive said committee, or to hear its message; that thereafter, and some few months prior to the injury as aforesaid, the plaintiff was again summoned before the directors at a regular meeting of said directors and asked to comply with the requirements of section 18 under penalty of losing his rights to benefits; and the said plaintiff did then and there

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refuse, saying, 'I will never get a uniform,' whereupon it was determined that he shall have no benefits from this society in accordance with the former vote of said defendant body; that subsequent to his injury aforesaid he appeared before a meeting of the board of directors on the matter of his claim for the time kept from profitable labor in consequence of his injury, at which meeting he was asked whether he would forthwith comply with the requirements of section 18; that he did then and there decline and did say that he would never do so, whereupon it was voted that he be not allowed any benefits from said defendant society; that said society since its incorporation and before and after the time when requests were made upon the plaintiff as hereinbefore set forth has adopted and has had a standard uniform."

The judge ordered judgment for the defendant, and from the judgment entered in pursuance of this order the plaintiff appealed.

The case was submitted on briefs.

C. J. Martell, for the plaintiff.

S. L. Bailen & F. Leveroni, for the defendant.

HAMMOND, J. Section 18 of the defendant's constitution reads as follows: "Within a year from their admission all members must be supplied with the society uniform (like the existing pattern) otherwise they shall lose all the rights to benefits and may be cancelled from membership." And the question is whether the plaintiff, having persistently refused to provide himself with the required uniform, is thereby deprived of his right to benefits.

It is contended by the plaintiff that this section is not fairly within the purposes for which the society was incorporated, and moreover that it is unreasonable. In considering these objections it is to be noted that this is not merely an organization for the physical relief of disabled members. It is of much wider scope. It is a society composed of people of Italian birth or ancestry, persons the greater part of whom are in a strange land but who desire to assist each other mutually in their new environment. The preamble speaks of "the purpose of promoting mutual assistance and relief, moral and intellectual education, in order to obtain the same rights and consideration which other Colonies [colonists?] enjoy, and share with them the influence which they exercise on the destiny of this country;" and the first section of the constitution recites that the society is established "with

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the purpose of promoting among members noble sentiments, mutual assistance and relief, and obtaining the moral and intellectual improvement of the associated." In a word it is a society whose members desire as strangers in a strange land to assist each other physically, morally and intellectually to obtain the advantages, either by way of citizenship or otherwise, of the land to which they have come.

And they desire to do things decently and in order. They have a love of show. The constitution requires that (§ 32) every six months twelve pall bearers shall be nominated to represent the society at the funeral of members dying in Boston, and that they shall be in full uniform when placing the "coffin in the hearse" and while marching in the funeral procession; that the uniform shall be worn (§ 80) by all members who take part in the annual "feast" of the society held in commemoration of its foundation and of the discovery of America, and (§ 83) by all members who take part in any public parade of the society. It does not appear nor is it contended by the plaintiff that this costume is of immoderate cost. It fairly may be assumed to be of moderate cost and seemly in appearance. The founders of this society evidently were convinced that whenever its representatives appeared to officiate as such at a funeral, or in a public parade, their appearance would be more impressive if all were clothed in the same uniform. Badges, insignia and uniforms within reasonable limits may tend to strengthen discipline and common ties and to impress upon the mind a greater and more realizing sense of that of which they are emblematical. The substance of show, or, in other words, the power of show, is not to be disregarded by him who desires to impress upon the members of an organization moral and religious truths. This power is seen in the effect of his country's flag upon the soldier, or of the cross upon the Christian worshipper. And even where the members alone meet, as in the case of their annual feast, uniformity of dress tends to prevent unseemly or ambitious attempts to outdo each other in attire and tends to increase the *esprit de corps*. It cannot be said that the requirement that the members should provide themselves with uniforms is outside the general purposes for which the defendant was incorporated, or that it was unreasonable. It was therefore the duty of the plaintiff to comply with the requirement.

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It is however further contended by the plaintiff that, even if this be so, nevertheless the penalty for non-compliance is too great. But that position is untenable. It cannot be said as matter of law that the penalty is too severe. It follows that the section stands as a valid part of the constitution.

The agreed facts show that after repeated requests to get a uniform and repeated warnings of the consequences of a refusal, the plaintiff finally absolutely refused, "whereupon it was determined that he shall have no benefits;" and all this before his injury. It is true that subsequent to the injury he appeared before a meeting of the directors on the matter of his claim for benefits, at which meeting he was asked whether he would forthwith comply with the requirement for the uniform, and answered that he never would do so, whereupon it was voted that he be allowed no benefits. But he had lost his right before, and this action of the directors is not to be taken as a waiver of the right to insist upon that fact.

Moreover it may well be doubted whether the right to benefits had not been lost by the very provisions of the constitution without any vote of the directors or of the society. It will be observed that in case of non-compliance § 18 distinguishes between the loss of benefits and the loss of membership. The recalcitrant member shall lose his benefits, but yet will retain his membership unless by some subsequent action he is expelled. And as if to make it more certain that a failure to get the uniform did of itself suspend the right to benefits it is provided (§ 85) that "They shall be punished with suspension of the sick benefit . . . who shall not have the society's uniform." This of itself would seem conclusive that the right to benefits even if lost under § 18 is suspended so long as the member shall not have the society's uniform although he may still remain a member of the society.

Judgment affirmed.

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ALF MONSEN *vs.* AMERICAN IMPORTING AND TRANSPORTATION COMPANY.

Suffolk. November 22, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Charter Party. Ship. Contract, Performance and breach.

In an action on a charter party for a balance of charter hire, it appeared that the defendant chartered a steamship of the plaintiff for a period of six months, that the plaintiff was to furnish the vessel with a full complement of officers and crew and that she was to be employed in the carriage of any "lawful merchandise, including petroleum and its products," between ports named in the charter party, including certain Atlantic ports of North and South America and the West Indies. The defendant excepted to the exclusion of evidence that in one of the months covered by the charter party there was a hurricane in the island of Jamaica which so devastated that island that no merchantable fruit could be obtained during the remainder of the charter period. The defendant contended that the hurricane was an "act of God" within the exception clause of the charter which prevented the defendant from performing his contract. *Held,* that the hurricane, as it affected only one kind of merchandise, was not an "act of God" excusing non-performance of the charter party, and that the evidence was excluded properly.

In an action on a charter party, under which the defendant hired a steamship of the plaintiff for a period of six months, for a balance of the charter hire for the last two months of the period, it appeared that the charter party contained the following provision: "Ship's bottom to be kept cleaned and steamer to be docked whenever captain and charterers think it necessary, but at least once in every four months, and payment of hire to be suspended until she is again in proper state for the service." The plaintiff's agent told the defendant that the plaintiff would have the vessel docked and cleaned at any time the defendant desired to have it done. The defendant did not at any time during the six months for which the vessel was hired ask that she should be docked or her bottom cleaned, and this was not done. It did not appear that the defendant, who had full control of the vessel, ever gave the plaintiff an opportunity to do this work, and he returned the vessel only at the expiration of the six months. The defendant contended that the failure of the plaintiff to dry dock and clean the vessel was a bar to the action. No claim in recoupment was made. *Held,* that under the circumstances the failure of the plaintiff to dry dock and clean the vessel was no ground of defense to the action; and that, if the defendant had suffered any loss from the failure to clean the vessel, his remedy was by way of recoupment.

CONTRACT for a balance of charter hire alleged to be due under a charter party made between the plaintiff as owner of the steam-

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ship Fagertun and the defendant as charterer dated August 14, 1909. Writ dated February 15, 1910.

In the Superior Court the case was tried before *Hardy*, J. The defendant chartered the vessel for a period of six calendar months at £400, lump sum, per calendar month, in advance. The defendant accepted the vessel and the term of the charter party began to run on September 18, 1909. Thereafter the defendant paid to the plaintiff the charter hire due and payable up to and including December 18, 1909; and the defendant further paid to the plaintiff on account of the charter hire due on January 18, 1910, the sum of $1,000. Thereafter the defendant paid no more on account of charter hire, although payment of the balance was demanded by the plaintiff.

The defendant offered evidence that during the month of November, 1909, there was a hurricane which devastated the island of Jamaica and that, on account of this hurricane, there was no merchantable fruit which the defendant could obtain during the remaining period of time that the charter was to run. The plaintiff objected to the evidence on the ground that it was irrelevant and immaterial, and the judge excluded it. The defendant excepted, and contended that it was proper evidence for the jury, under clause 8 of the charter party, tending to show that the charterer was prevented by an act of God from performing his contract and hence was not liable under the charter.

Clause 8 of the charter party was as follows: "That should the vessel be lost, any hire paid in advance and not earned (reckoning from the date of the loss) shall be returned to the charterers with interest from the date of loss. The act of God, the governments, enemies, fire, restraints of princes, rulers and people and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation throughout this charter party always excepted."

The judge refused to order a verdict for the defendant. In support of an exception to the refusal the defendant contended that, as the plaintiff did not show performance of clause 10 of the charter party in that the Fagertun was not cleaned every four months, as therein provided, under that clause the charter party was suspended and the defendant was not liable.

Clause 10 of the charter party was as follows: "Ship's bottom to

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be kept cleaned and steamer to be docked whenever captain and charterers think it necessary, but at least once in every four months, and payment of hire to be suspended until she is again in proper state for the service."

The defendant also contended that, as the charter party was suspended by the failure to dock, the plaintiff could not recover on an action of contract on the charter party.

The judge ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

A. C. Gould, for the defendant.

R. E. Goodwin, for the plaintiff.

HAMMOND, J. 1. The evidence as to the hurricane in Jamaica and the consequent inability of the defendant to procure merchantable fruit for carriage was properly excluded. By the terms of the charter party the owner was to furnish the vessel with a full complement of officers and crew, and she was to be employed in the carriage of any "lawful merchandise, including petroleum or its products," between ports named in the charter party, including certain Atlantic ports of North and South America and the West Indies. That the hurricane in Jamaica, affecting as it did only one kind of merchandise, was not an "act of God" within the meaning of the eighth section of the charter party sufficiently to avoid the same is too clear for discussion.

2. The tenth section of the contract provided that the vessel's bottom should be kept cleaned and she was to be docked at least once in every four months, and payment of hire was to be suspended until she should be again in proper condition for the service. The defendant did not at any time during the six months for which the vessel was hired request or demand that she should be docked and her bottom cleaned, and this was not done. One Paasche, who signed the charter party on behalf of the plaintiff and acted as his agent and representative with reference to the management of the vessel testified that, as he remembered, he told the defendant that the owner would have the vessel docked and cleaned at any time the defendant desired to have it done. This testimony was uncontradicted, and the defendant does not argue that it is not true.

But it contends that the failure to comply with this requirement is in any event a bar to this action. It does not appear that the

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defendant company, which by the terms of the contract had full control of the movements of the vessel, ever gave the plaintiff an opportunity to do this work; and, as before stated, it never intimated a desire to have it done. The vessel was not surrendered until the expiration of the six months, the time for which she was chartered. There is no good ground for contending that this provision was intended to work a forfeiture of the right to charter hire. The clause properly construed means that charter hire shall be suspended so long as the charterer is deprived of the use of his vessel by the process of dry docking and cleaning. In legal effect this was an agreement either to dry dock the vessel at least once in every four months, or else allow the charterer his actual loss from the failure to clean her. *Falls of Keltie Steamship Co.* v. *United States & Australasia Steamship Co.* 108 Fed. Rep. 416. See also *Munson Steamship Line* v. *Miramar Steamship Co.* 150 Fed. Rep. 437, and *Bollman* v. *Tweedie Trading Co.* 150 Fed. Rep. 434. If the defendant suffered any loss by the failure to clean the vessel, its remedy was by way of recoupment. But no such claim is made. We are of opinion that under the circumstances the failure of the owner to dry dock and clean the vessel is no ground of defense to this action.

Exceptions overruled.

COUNTY OF NORFOLK *vs.* LOUIS A. COOK.

Suffolk. November 24, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Clerks of Courts. County Commissioners. Contract, Implied in law: common counts. *Mistake.*

Under St. 1904, c. 451, § 6, a county treasurer has no authority to pay to the clerk of the courts of the county the amount of his travelling expenses incurred in going between the clerk's office and his house in another town, and the clerk has no right to receive such payment. Following *Cook* v. *County of Norfolk,* 201 Mass. 257.

Under St. 1904, c. 451, § 6, providing for the allowance of certain travelling expenses of the clerks of courts by the respective counties in which such courts are established, "which expenses shall be audited by the county commissioners," the county commissioners have no jurisdiction to allow and approve a payment not authorized by the statute.

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The rule, that money voluntarily paid by a person in his own behalf under no mistake as to the facts cannot be recovered back, does not apply to an action brought by a county to recover the amount of an unauthorized payment made in good faith by the county treasurer.

CONTRACT OR TORT, with a count for an alleged conversion, a count to recover money paid under a mutual mistake, and a count on an account annexed for money paid to the defendant as clerk of the courts of Norfolk County for travelling expenses, incurred in going between his house in the town of Weymouth and the clerk's office in the town of Dedham upon days when the court was in session, to which the defendant was not entitled.

In the Superior Court the case was submitted to *Hardy*, J., upon an agreed statement of facts. The judge made a *pro forma* finding for the defendant and reported the case for determination by this court. The facts are stated in the opinion.

H. T. Richardson, for the plaintiff.

L. A. Cook, pro se.

HAMMOND, J. St. 1904, c. 451, after establishing the salaries of the clerks of the county courts, provides (§ 6) that "The clerks of courts . . . shall each be allowed by the respective counties in which said courts are established their travelling expenses necessarily incurred when holding sessions of said courts out of the cities or towns in which they severally reside, which expenses shall be audited by the county commissioners." The plaintiff lived in Weymouth, while Dedham was the county seat where alone the clerk's office was located and the county courts held. After the passage of the statute the defendant claimed that he was entitled to receive from the county treasury the amount of expenses incurred by him in travelling between his house in Weymouth and the clerk's office in Dedham; and in compliance with such claim there were paid to the defendant from the treasury of said county by the county treasurer, several bills for such expenses, the bills "having been allowed and approved by the county commissioners." It seems to have been supposed by all parties that the statute authorized the payment of these bills. There is no question of their good faith.

After the payments had been made, it was decided by this court in a case to which the defendant was not a party, that the statute did not authorize such payments. *Cook* v. *County of*

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Norfolk, 201 Mass. 257. Whereupon demand was made by the plaintiff upon this defendant for the return of the sums thus paid him, and upon his neglect or refusal to comply with the demand this action was brought.

The first contention of the defendant is that the decision in *Cook* v. *County of Norfolk, ubi supra*, was wrong and that he was lawfully entitled to receive the money. But we remain satisfied with the decision. It must be held that the payment was illegal. The county treasurer had no authority to pay, and the defendant no right to receive this money.

His next contention is that the county commissioners as a court adjudicated that the money was due him, and that such adjudication is conclusive upon the county. But this is not tenable. So far as they acted within the statute they were by its plain language acting simply as auditors, and so far as they were acting outside the statute they were acting outside their jurisdiction. See for a similar case *McLean* v. *County of Montgomery*, 32 Ill. App. 131.

As the last ground of defense the defendant invokes for his protection the rule that money voluntarily paid under no mistake as to the facts cannot be recovered back. He takes the position that even if the transfer of the money from the treasury of the county to his pocket was illegal, and even if he neither then nor since has had any equitable right to it, still he will invoke this technical rule of law to keep the money if he can. Without stopping to comment upon the ethical aspects of such a defense we proceed to consider its legal aspects.

The rule is of very general application between individuals. An individual is dealing with his own money. If, to avoid trouble facing him in the shape of a lawsuit or in any other form, he with full knowledge of the facts and not under compulsion but voluntarily pays out money, he has waived his right to contest the validity of the claim. He is dealing with his own money and as a principal. He can do as he chooses with it and is answerable to no one. But public officers are dealing with money which is not their own and over which their powers are subject to well known limitations. They can pay when the law requires or permits, and they cannot pay when it forbids. So far as they act within their powers the public, whose agents they are, must abide the consequences. But when they act beyond their powers they do not

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bind their principals. The payment of this money in this case was not the act of the county, but simply the unauthorized act of a public officer. It was not the voluntary payment of money by the owner, but by one who had no beneficial interest in it and who was not authorized by the principal to make the payment. Manifestly one of the chief conditions for the application of the rule is wanting. To such a condition of things the rule does not apply; and such is the great weight of authority. *Demarest* v. *New Barbadoes*, 11 Vroom, 604. *Commonwealth* v. *Field*, 84 Va. 26. *Fort Edward* v. *Fish*, 156 N. Y. 363. *Frederick* v. *Douglas County*, 96 Wis. 411. *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190. *Camden* v. *Varney*, 34 Vroom, 325. *Ellis* v. *Board of State Auditors*, 107 Mich. 528. *McLean* v. *County of Montgomery*, 32 Ill. App. 131. See also the cases cited in the notes to § 796 of Page on Contracts. No other ground of defense is urged by the defendant.

Judgment for the plaintiff for $341.44, and interest from the date of the writ.

GEORGE H. SWEETSER & another, trustees, *vs.* WINFIELD C. JORDAN & another.

S 216 - 350

Middlesex. November 29, 1911. — March 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Bills and Notes, Waiver of demand and notice. *Witness*, Examination. *Evidence*, Testimony at former trial, Admissions and confessions.

In an action against the indorser of a promissory note given by a corporation, of which the defendant's son was the treasurer, and indorsed also by such son, it was admitted that no demand for payment was made upon the maker and that no legal notice of non-payment was given to the defendant, and the issue tried was whether the defendant had waived demand and notice. There was evidence on which it could be found that at the time the note matured there was an understanding between the plaintiff and the defendant's son that there was to be no demand on the note but that it was to be paid by a new note signed by the same parties, and that, in reliance upon this understanding and induced by a promise of the defendant's son that he would bring the new note, the plaintiff made no demand on the maker on the day of the maturity of the note but

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waited during the whole of the business part of that day for the new note. The defendant, who was called as a witness by the plaintiff, testified that in all matters of negotiation about the borrowing of money, giving of notes and renewal of notes, his son acted for him. *Held*, that there was evidence that the defendant's son in negotiating for the renewal of the note and promising to bring the new note was acting not only for himself but also as the authorized agent of the defendant, and that the question whether the defendant had waived demand and notice at or before the maturity of the note was for the jury.

Where in an action of contract the defendant is called by the plaintiff as a witness, he may be asked about his testimony at another trial, irrespective of the question whether such evidence is contradictory to his present testimony, if such previous testimony is an admission of a material fact.

CONTRACT against Winfield C. Jordan and his father Charles Jordan as the indorsers upon a promissory note signed "Wakefield Reed Chair Co., by W. C. Jordan, Treas.," dated August 4, 1898, for $1,500, payable three months after date "to the order of ourselves" with interest, and indorsed by the Wakefield Reed Chair Company, by the defendants and by one Henry H. Savage. Writ dated November 22, 1898.

Neither the Wakefield Reed Chair Company nor Henry H. Savage were made defendants. The defendant Winfield C. Jordan pleaded his discharge in bankruptcy.

In the Superior Court the case was tried before *Wait*, J., against the defendant Charles Jordan, who it was contended by the plaintiffs had waived demand and notice. The plaintiffs called the defendant Charles Jordan as a witness. Certain questions put to him were excluded by the judge against the plaintiffs' exception. At the close of the plaintiffs' evidence the judge ordered a verdict for the defendants; and the plaintiffs alleged exceptions. The facts which could have been found upon the evidence are stated in the opinion.

The question asked in regard to the defendant Charles Jordan's testimony given previously in the Probate Court, which is referred to in the opinion, was whether the witness then testified that the note in suit was given in renewal of a note given in 1897. The judge excluded the question on the ground that its subject matter had been excluded and that there was no testimony of the witness which the answer to the question would tend to contradict.

The case was submitted on briefs.

S. K. Hamilton & T. Eaton, for the plaintiffs.

E. R. Anderson & J. G. Bryer, for the defendant Charles Jordan.

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HAMMOND, J. This case was tried against Charles Jordan alone, hereinafter called the defendant. It was admitted that the note was for valid consideration and that the signatures were genuine. The chief ground of defense was that there had been no sufficient demand and notice to charge the defendant.

Inasmuch as the note matured in November, 1898, the liability of the defendant depends upon the law existing in this Commonwealth previous to the general act relative to negotiable instruments, which, although approved on June 15, 1898, did not go into effect until January 1, 1899. St. 1898, c. 533, § 198.

The note matured on November 4, 1898. St. 1896, cc. 228, 496. The defendant, his name being only on the back of the note, whether he was a joint promisor or only an indorser in the strict sense, was entitled to notice of non-payment as an indorser. At the maturity of the note no demand for payment was made upon the maker, nor was any legal notice of non-payment given to the defendant; and if the case rested here there would be nothing for the plaintiffs.

But the plaintiffs contend that the defendant waived demand and notice. The evidence would have warranted a jury in finding that for several days before the maturity of the note negotiations had been going on between the plaintiffs and Winfield C. Jordan looking to a renewal of this note by the giving of another having upon it the same names; that the plaintiffs had agreed to take such a note and Jordan had agreed to furnish it; that before breakfast on the day of the maturity of the note Jordan called upon Sweetser acting for the plaintiffs and said to him in substance as follows: "I came up to tell you how this matter stood. We have made all satisfactory arrangements to have this note renewed, but I came up this morning because I wanted you to know that I could not possibly get up to your house until evening, and I thought you would be anxious about it, and to relieve you I wanted to tell you that things were all satisfactorily arranged and I should be up with the note . . . [this] . . . evening, but I could not possibly get . . . [here] . . . before and I wanted you to feel easy in regard to it." And the jury might further find from this and the previous interviews on the same subject between Sweetser and Jordan that it was the understanding between them, (or at least that Sweetser thought, and was justified by the acts and words of Jordan in thinking, that such was the understanding,)

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that there was to be no demand on the note, but that it was to be paid by the new note; that in reliance upon this understanding and induced by the promise of Jordan to bring up the new note Sweetser made no demand upon the maker on the day of the maturity of the note, but waited during the whole business part of that day for the new note.

"It is settled that when the indorser, at or shortly before the time when a note becomes due, says to the holder that he will arrange for its payment, and in direct terms or by reasonable implication requests the holder to wait, or give time, it amounts to an assurance that the note will be paid, or that the promisor or indorser will pay it, and is a waiver of demand and notice, because it puts the holder off his guard." Colt, J., in *Armstrong* v. *Chadwick*, 127 Mass. 156, 157, citing *Gove* v. *Vining*, 7 Met. 212, which see, with the cases therein cited. Applying this rule of law to the findings above mentioned, it is clear that the question whether there was a waiver of demand and notice by Jordan and those for whom he had authority to act was for the jury.

But the more difficult question is whether Jordan in all this was acting not only for himself but also as the authorized agent of his father, the defendant. The new note was to have upon it the same names that were upon the old note; and as between the plaintiffs and Jordan the latter seemed to be acting for all who were liable on the first note. Was he authorized to act for his father so far as to bind the latter in waiving demand and notice? The burden was upon the plaintiffs to prove this agency. The first witness called by them was the defendant himself. Among other things he testified that he did not "ask anybody to renew any notes for the company;" that in the management of the affairs of the Wakefield Reed Chair Company and his connection with it he entrusted his interests to his son Winfield, and that this son acted in his behalf in connection with all matters that he and his son had in relation to that company. Had he stopped here it might well have been argued that he was speaking only of his relations with the company, and not of the relations between him and the company on the one side and third persons including the plaintiffs on the other. But later in the examination this further question was put to him, namely: "In all matters of negotiation about the borrowing of money, giving of notes and renewal of notes,

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your son, Winfield C. Jordan, acted for you, I think you said," to which he replied, "Yes, sir." The answer was unequivocal. And it is to be noted that although at the end of his examination he was questioned by his counsel by way of cross-examination as to several important features of the case, especially as to the time when and the manner in which he finally was notified of the non-payment of the note, he was asked no question as to what he meant by the answer to this question; and he left the stand without any attempt to explain or qualify it. It stands out clear and direct as given. This evidence, especially when taken in connection with the other circumstances of the case, would warrant a finding that in negotiating for the renewal of the note including the promise of the son to bring up the new note in the evening, the son was acting not only for himself but also as the duly authorized agent of the defendant. Upon such a finding the rule of law above stated as to waiver of demand and notice would be applicable to the defendant. The question whether the defendant had waived demand and notice at or before the maturity of the note was for the jury. The exceptions must therefore be sustained.

It becomes unnecessary to consider the exceptions to the exclusion of evidence. It may be remarked, however, that so far as the evidence which the defendant sought to introduce bore upon the consideration of the note it was properly excluded within the discretion of the court as unnecessary, it being conceded by the defendant that the note was upon a valid consideration, but that so far as it had any tendency (if any it had) to show the course of dealing as bearing upon the nature and scope of the agency conferred by the father upon the son in the matter of waiving demand and notice it should have been admitted.

It may be further remarked that if the evidence offered as to the defendant's testimony given previously in the Probate Court was in the nature of an admission against his interest in the present case, it was admissible, entirely irrespective of the question whether such evidence was contradictory to his testimony in the present case. The witness was not only a witness, but he was the party defendant; and therefore any admission against his own interest wherever made was admissible even if he had not been here a witness.

Exceptions sustained.

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BRIGHTON PACKING COMPANY *vs.* BUTCHERS' SLAUGHTERING AND MELTING ASSOCIATION.

212 - 242
216 - 478

Suffolk. January 19, 1912. — March 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Contract, What constitutes. *Equity Jurisdiction*, Specific performance. *Corporation*, Identity, Reorganization. *Estoppel.*

In a suit in equity by the alleged assignee of a lease of real estate and of a subsequent agreement of modification, to enforce the provisions of such subsequent agreement, it appeared that the lease was given by the defendant to a certain South Dakota corporation, which entered into possession of the premises as lessee, that such lessee caused to be organized under the laws of Maine another corporation of the same name with the same amount of capital stock, which was issued to its stockholders in exchange for their shares, that the officers were substantially the same, that the business to be carried on was the same, and that the South Dakota corporation transferred all its property to the Maine corporation and assigned to it the lease made by the defendant, but that the existence of the Maine corporation and the assignment purposely were concealed from the defendant, that thereafter the agreement of modification was drawn purporting to be made by the parties to the lease and its execution was authorized by a vote of the directors of the South Dakota corporation, whereupon it was executed for and in behalf of the Maine corporation by the person who was president of both companies. The officers of the Maine corporation intended the defendant to believe that the agreement was executed by the South Dakota corporation, the original lessee, and the defendant executed the agreement, believing and having reason to believe that it was an agreement with the South Dakota corporation. The assignment to the plaintiff was from the Maine corporation. *Held*, that the minds of the parties never met as to the alleged agreement of modification and that it never was made.

If a corporation conveys all its property and assets to a new corporation of the same name organized under the laws of a different State, which assumes all the liabilities of the first corporation, and if the new corporation has the same stockholders, officers and agents as the first one and carries on the same business at the same place in the same manner and under the same management, the two corporations have separate and distinct existences, being subject to different laws, and are not the same person at law or in equity.

In a suit in equity to enforce an agreement assigned to the plaintiff by a certain corporation, which was executed and intended to be made with the defendant by the plaintiff's assignor when the defendant was ignorant of the existence of that corporation and by reason of the fraudulent concealment of the truth by the plaintiff's assignor believed that he was making an agreement with another corporation of the same name organized under the laws of a different State, acts of the defendant, based upon the same erroneous belief, recognizing the plaintiff as the assignee of the agreement and permitting the plaintiff to

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incur expense relying upon the validity of the agreement and in expectation of its fulfilment, do not estop the defendant from setting up the defense that he never made the alleged agreement with the plaintiff's assignor.

In a suit in equity to enforce an alleged agreement to furnish to the plaintiff refrigeration, steam, electricity and water, if it appears that there was an expectation of both parties that these things would be furnished by the defendant to the plaintiff upon terms mutually satisfactory, that there were some negotiations toward this end, and that the plaintiff relying on such expectation and negotiations incurred great expense, this does not estop the defendant from maintaining the defense that no contract ever was made between the parties.

BILL IN EQUITY, inserted in a common law writ in the Superior Court, dated July 12, 1910, and amended on June 30, 1911, for the specific performance of the provisions of a lease in writing of a slaughter house and other premises made by the defendant to the Batchelder & Snyder Company, a corporation organized under the laws of South Dakota, dated October 30, 1907, as alleged to have been modified and extended to other slaughter houses and buildings by an agreement of February 29, 1908, the plaintiff being alleged to be the assignee of said lease and agreement from the Batchelder & Snyder Company, a corporation organized under the laws of the State of Maine, which was alleged to have been formed by a reorganization of the South Dakota corporation of the same name and to have succeeded to all its property and rights. The bill contained also a prayer for damages.

In the Superior Court the case was referred to Homer Albers, Esquire, as master, under an order directing him to report his findings with such facts and questions of law as either party might request, and also directing him to report the evidence taken by him. Later the case came on to be heard before *Pierce*, J., for a final decree on the evidence taken and reported by the master, the master's findings and report of the facts, and the exceptions thereto. The judge reserved and reported the case on the evidence, the master's report, the exceptions thereto and all questions of law therein, for determination by this court.

F. H. Nash, (*A. P. Hardy & R. A. Stewart* with him,) for the plaintiff.

H. D. McLellan, for the defendant.

SHELDON, J. The most important question raised in this case is whether the plaintiff can enforce against the defendant the agreement purporting to be made between the defendant and the Batchelder & Snyder Company, dated February 29, 1908, for

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the purpose of amending, modifying and extending the lease given by the defendant to one of the Batchelder & Snyder Companies under date of October 30, 1907. The plaintiff claims that it is the assignee of the lease and of this modifying agreement, and that it has the right to enforce the agreement against the defendant.

On or about October 30, 1907, the defendant gave to the Batchelder & Snyder Company, a corporation organized under the laws of South Dakota, a lease for a term of years of a slaughter house and other premises, including three refrigerators, for a rent therein stated. In this lease the defendant agreed also to furnish the necessary refrigerating pipes for properly cooling these refrigerators and to supply to the lessee on stated terms refrigeration for these refrigerators and "all the hot and cold water, steam and electricity needed in said lessee's business on the described premises." The lessee, the South Dakota corporation, entered into possession under the lease. On or about February 7, 1908, the parties who were interested in the South Dakota corporation, the lessee, caused to be organized under the laws of Maine another corporation, also named the Batchelder & Snyder Company. With some small differences, apparently adopted to comply with the laws of Maine, the officers of the Maine company were the same as those of the South Dakota company; the business to be carried on was the same; the stockholders were the same, the stock of the new company being issued to the stockholders of the old company in exchange for their shares. The South Dakota company transferred all its property and on or about February 28, 1908, assigned the lease in question to the Maine company; and, as the master has found, "these two corporations and their stockholders and officers understood that . . . the Maine corporation had become the possessor and owner of all property and rights of the South Dakota company, together with all of its liabilities and obligations." The Maine company now took possession of the demised premises. But the defendant and all its officers and agents were wholly ignorant of the change and of this assignment, not learning of them at all until some time after the bill had been brought, and supposed that they were still dealing with the South Dakota company. Indeed, we are of opinion upon the facts found by the master that the change and the assignment purposely were kept hidden from the defendant. This necessary inference we are of course at

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liberty to draw. *M. Steinert & Sons Co.* v. *Tagen*, 207 Mass. 394, 397. The effect of these transactions was to strip the South Dakota company of all its assets and to stop it from doing any further business, although the Maine company had purported to assume its liabilities. And this, as we have seen, was concealed from the defendant.

After this, on or about February 29, 1908, the modifying agreement was made. It recited the lease given by the defendant to the South Dakota company, and purported upon its face to be made between the parties to that lease. By vote of the directors of the South Dakota company, its president was authorized "to sign for the corporation" the original lease to that corporation of October 30, 1907, which had been executed some time before, and already, as we have seen, had been assigned to the Maine company, "and the amendment to such lease dated February 29, 1908." Batchelder, the president of both companies, did execute this amendment or modifying agreement, and appears to have had from the Maine company no express authority to do so. But the seal of the Maine company was affixed to the agreement. The master has not found by which of the two companies it was executed. He has found that the defendant thought and had reason to believe that it was executing this agreement with the South Dakota company. But the parties who were or had been interested in the South Dakota and the Maine companies contemplated at this time doing business under the charter of the Maine company only, though they kept the charter of the South Dakota company alive. And they then intended that the modifying agreement should be effective and binding upon the company which was to continue the business, that is, the Maine company.

The counsel for the plaintiff has earnestly and powerfully argued that the modified agreement was properly executed by the defendant and the Maine company and is valid and binding upon the defendant, and that the lease and this agreement have vested in the plaintiff by assignment from the Maine company. The master has declined to find, as he was requested by the defendant to do, that the defendant and the Maine company did not enter into this modifying agreement. He has not found precisely and exactly what was the fact as to this question; and this failure has somewhat embarrassed us. But upon a careful examination both of

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his report and of the evidence we are convinced that it was the Maine company which executed it and which intended to execute it, though intentionally concealing this from the defendant, whose officers and agents believed and were intended by those who were acting for the Maine company to believe that the agreement was made and executed by the South Dakota company, the only tenant under the lease of which the defendant then had any knowledge. Whether the defendant would have made such an agreement with the Maine company of course cannot be known. It is enough to say that the minds of the nominal contracting parties never met, and the agreement never has had any validity. It was not an agreement made by the defendant with a person then present, but under some mistake as to the identity or character of that person, in which case it might have been merely voidable and good until avoided, like the bargain first considered in *Edmunds* v. *Merchants' Despatch Transportation Co.* 135 Mass. 283. Here the defendant's agreement was expressed to be with the South Dakota company; but there were before the defendant two companies, that of South Dakota and that of Maine, both acting through Batchelder, but only the first one being known to the defendant, and not only the presence but the very existence of the second being kept from its knowledge. There was no agreement with the South Dakota company, because that company intended to make none, and did not execute the paper in which the purported agreement was embodied; none with the Maine company, because there was no intention to contract with it; it was not mentioned as a party to the agreement, and could no more gain the rights of a party by a surreptitious and really fraudulent execution thereof than, for example, the present plaintiff could have entitled itself to the estate created by the original lease if, without the knowledge and consent of the defendant, it had executed that lease as then drawn, while leading the defendant to suppose that the execution was really by the South Dakota company, the lessee therein named. No agreement can result from such a transaction so carried out. *Rodliff* v. *Dallinger*, 141 Mass. 1. *Consumers' Ice Co.* v. *Webster, Son & Co.* 53 N. Y. Supp. 56; 32 App. Div. (N. Y.) 592. *Boulton* v. *Jones*, 2 H. & N. 564. *Hardman* v. *Booth*, 1 H. & C. 803. *Hollins* v. *Fowler*, L. R. 7 H. L. 757. *Cundy* v. *Lindsay*, 3 App. Cas. 459; 2 Q. B. D. 96, reversing *S. C.* 1 Q. B. D.

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348. *Baillie's case*, [1898] 1 Ch. 110. *Gordon* v. *Street*, [1899] 2 Q. B. 641. This case differs essentially from those cases in which there was a real contract, though entered into by mistake or even produced by fraud. *Stoddard* v. *Ham*, 129 Mass. 383. *Hunter* v. *Giddings*, 97 Mass. 41. *Rayner* v. *Grote*, 15 M. & W. 359. *Schmaltz* v. *Avery*, 16 Q. B. 655.

But it has been argued that the substitution of one company for the other made no real difference; that the defendant had no reason to prefer one to the other; that it would as readily and as willingly have contracted with the Maine company as with that of South Dakota. Perhaps it would have been so, though perhaps it might have made a difference if the agreement had turned out unfortunately for the other side and the defendant had sought to enforce it. But the real point is that the defendant, though willing and ready to contract with the one company, its lessee, yet made no agreement with either; and we cannot enforce against the defendant an agreement which it never made.

The claim has been made also that it is only in a technical sense that these two companies could be called distinct entities. They had the same capital stock and practically the same stockholders, officers and agents; the Maine company had taken over all the assets and assumed all the liabilities of the other, and was carrying on the same business, at the same stand, in the same manner and under the same management. The master has found that for practical purposes the two companies were the same. Accordingly the plaintiff contends that an agreement with the one is the same as an agreement with the other, that the defendant's ignorance of their separate identity was immaterial, that the agreement may be treated as made with either company indifferently, was capable of enforcement by either or at least by the Maine company, and is valid in the hands and for the benefit of the plaintiff. But we cannot assent to this reasoning. These are two distinct corporations, created by the laws of two different States. The powers of each corporation are limited and controlled by the statutes of the State which created it, and it is scarcely conceivable that the statutes of the two States are the same or that the franchises and powers of the two corporations are identical. But if this were so, it would remain true that they are the creation of two different governments, the offspring of different parents, and

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not only distinct legal entities, but having separate and distinct existences. They could and did make contracts with each other; they might bring suits against each other. They are in no respect the same person. This is the basis of our decision in *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 192 Mass. 391, and *Myott* v. *Greer*, 204 Mass. 389. See also *New York Bank Note Co.* v. *Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280, overruling *S. C.* 28 App. Div. (N. Y.) 411; *Wooster* v. *Crane & Co.* 3 Buch. 22; *Niagara Fire Extinguisher Co.* v. *Hibbard*, 179 Fed. Rep. 844; *Jordan Marsh Co.* v. *Beals*, 201 Mass. 163. Cases of the change of state into national banks under the federal statute are distinguishable. *Atlantic National Bank* v. *Harris*, 118 Mass. 147. *City National Bank* v. *Phelps*, 97 N. Y. 44. *People's National Bank* v. *Commissioners of Kingfisher County*, 24 Okla. 145. The case of *Andres* v. *Morgan*, 62 Ohio St. 236, stands alone so far as we have seen, and we are not disposed to follow it. This question did not arise and was not considered in *Pope* v. *Hinckley*, 209 Mass. 323. In *Forbes* v. *Thorpe*, 209 Mass. 570, 580, it was taken for granted that a corporation was a distinct legal entity from a partnership of which it was a reorganization.

It is contended however that the defendant has waived its defense that the modifying agreement is invalid in the hands of the plaintiff and has estopped itself from making this defense by recognizing the plaintiff as the assignee of the lease and the agreement, and permitting the plaintiff to incur great expense on the faith of the agreement and in reliance upon its validity and expectation of its fulfilment. The findings of the master tend to support this contention. But it cannot be maintained. All this conduct of the defendant grew out of and was based upon its belief that it had made a valid agreement with the South Dakota company, a belief which was wholly erroneous and was caused by the Maine company's fraudulent concealment of the truth. The plaintiff claims only under the latter company, and has only its rights. For the same reason the reference to arbitration can, as to this, have no more effect than the pretended modifying agreement upon which it is based. The arbitrators were not to determine and did not undertake to determine the question of the defendant's obligation to furnish refrigeration, steam and electricity to the plaintiff, but merely as to future matters to fix the cost, price and mode of

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measuring the amount thereof. The plaintiff is doubtless the assignee of the original lease, and the defendant has recognized it as such; but that is all. Moreover the evidence as to what has been done goes no further than to show an expectation of both parties that refrigeration, steam, electricity and water would be available and would be supplied by the defendant to the plaintiff upon terms mutually satisfactory. Taken by themselves, as under the circumstances of this case these facts must be, they show nothing more than this expectation and some negotiations toward carrying it out. Expectations and negotiations fall far short of a binding agreement. *Smith* v. *Gowdy*, 8 Allen, 566. *Lincoln* v. *Erie Preserving Co.* 132 Mass. 129. *Ashcroft* v. *Butterworth*, 136 Mass. 511, 514. *Cheney Bigelow Wire Works* v. *Sorrell*, 142 Mass. 442. *Cummings* v. *Perry*, 169 Mass. 150, and 177 Mass. 407. *Shady Hill Nursery Co.* v. *Waterer*, 179 Mass. 318. *Cunningham* v. *Connecticut Fire Ins. Co.* 200 Mass. 333. *Chicago & Great Eastern Railway* v. *Dane*, 43 N. Y. 240. *Moulton* v. *Kershaw*, 59 Wis. 316. In *Carpenter* v. *Pocasset Manuf. Co.* 180 Mass. 130, the defendant's recognition of the plaintiffs was not made under a pretended but really non-existent agreement or induced by any wrongful act of the plaintiffs or their assignee.

We need not consider whether under the circumstances here found the defendant could in equity elect to treat the modifying agreement as made by either the South Dakota or the Maine company and as enforceable against the plaintiff. The defendant has made no such election, and it is of no consequence to determine what its effect would have been if made.

There is no occasion to discuss the exceptions taken by the defendant to the master's report, or some other questions which have been argued in behalf of the plaintiff. Upon the facts found by the master and the findings which we are compelled to make from those facts and the evidence reported, the bill cannot be sustained, and under the terms of the reservation must be dismissed with costs.

So ordered.

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CHARLES H. BLAKE *vs.* WILLIAM J. CORCORAN & others.

Suffolk. November 16, 1911. — March 4, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Attorney at Law. Lien. Evidence, Presumptions and burden of proof. *Infant,* Next friend. *Release.*

R. L. c. 165, § 48, which gives to an attorney at law a lien upon money collected by him on an execution in favor of a client for the amount of his fees and disbursements, gives such attorney no lien for counsel fees for services, and, if he is sued by his client for money had and received, and it appears that he retained from the money collected on the execution an amount in excess of the amount of the fees and disbursements upon a claim for compensation for his services, the burden of proof is on the defendant to show that his claim for counsel fees is at least equal to the balance thus retained by him, and the question of the amount of the defendant's claim is for the jury on the evidence presented.

A father who has acted as next friend for his minor son in an action by the son for personal injuries, after a judgment for the plaintiff has been entered and execution has issued and has been satisfied, has no authority to settle a controversy with the attorney at law who conducted the action as to the amount to be retained by the attorney for his services out of the money collected by him upon the execution, or to give in behalf of the minor a release of the attorney from all claims.

HAMMOND, J. This is an action for money had and received, brought by a minor, through his mother as next friend, against the defendants who are attorneys at law. The answer, in addition to a general denial, sets up payment and release.

It appeared that the plaintiff brought an action by his father as his next friend against one Dana, to recover for damages for injuries received by the plaintiff. The father also brought an action in his own name for the loss of services of the plaintiff by reason of the injuries. The actions were tried together and both plaintiffs recovered judgment, — the present plaintiff for $7,000 and costs and the father for $1,000 and costs. Executions were issued, and the defendants as the attorneys of the plaintiff and his father received thereon a total of $8,353.62, of which $7,049 damages and $172.81 costs were collected upon the execution which ran in the name of the plaintiff. There was a dispute between the father and the defendants as to the amount to be re-

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tained by the latter for their services and expenditures, but finally the father agreed to take $5,158.05 in full settlement. The defendants paid that amount to him and he gave a release in full both in his individual capacity and as the plaintiff's next friend. The plaintiff being dissatisfied with this settlement, this action was brought to recover a balance claimed to be due from the defendants. At the trial before a jury the presiding judge* at the close of the plaintiff's evidence ruled that the release was not binding on the plaintiff, and having so ruled ordered a verdict for the plaintiff for $1. The case is before us upon the plaintiff's exceptions to the order directing a verdict for $1.

Undoubtedly the burden was upon the plaintiff to show not only that the money was received by the defendants, but also that it was received to the use of the plaintiff. In this case it appears that the amount of the execution running in favor of the plaintiff was received by the defendants. They had a lien upon the money for their fees and disbursements, R. L. c. 165, § 48, and to that extent perhaps may be said to have received it in trust for themselves. But they had no lien for counsel fees. *Getchell* v. *Clark*, 5 Mass. 309. *Baker* v. *Cook*, 11 Mass. 236. R. L. c. 165, § 48. *Ocean Ins. Co.* v. *Rider*, 22 Pick. 210. The balance over and above the amount of the fees and disbursements was therefore received to the plaintiff's use. Upon this balance the defendants had no lien. Their counsel fees for services were merely a personal claim of which they might avail themselves in this action as in the nature of a reduction or set-off. See *Dale* v. *Sollet*, 4 Burr. 2133, and cases cited in notes to the same case in 1 Ames, Cases on Trusts, 8. But they could have held enough money to pay their claim not upon the ground that it was received originally to their use, but upon the ground that though originally received to the plaintiff's use it ought to go to pay their claim. It is clear that at least as to so much of the proceeds of the execution as was not needed to satisfy the lien of the defendants for fees and disbursements, the only right of the defendants to retain it was by way of set-off for a debt due from the plaintiff to the defendants. And the burden was upon the defendants to show the nature and extent of that debt. It appears that the defendants held back much

* *Hardy*, J.

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more than sufficient to satisfy their lien, and for this balance less the amount already paid they were answerable unless they showed to the satisfaction of the jury that their claim for counsel fees was at least equal to it. If the defendants' claim was equal to or exceeded this balance, then there should have been a verdict for the defendants; if otherwise, then for the plaintiff. And this question of the amount of the claim was for the jury. The ruling that as matter of law the damages should be limited to $1 was wrong.

It is argued, however, by the defendants that the ruling that the release was not binding upon the plaintiff was wrong; that on the contrary the release was a perfect bar to the action and that accordingly the verdict should have been for the defendants on the question of liability and therefore the plaintiff was not harmed by the ruling on the question of damages, and hence that his exceptions should be overruled.

Although the record discloses no exception to this ruling as to the release, yet in view of these contentions of the defendants and of the probability that the question as to its soundness may arise at the next trial, it is deemed advisable to consider it.

It is to be noted that at the time of the release the case against Dana in which the father had appeared as next friend had come to an end. There was no longer any controversy between the plaintiff and Dana. The only controversy was between the plaintiff and the defendants, and it related simply to a claim against the plaintiff, or more narrowly stated it was a controversy as to how much of the plaintiff's money then in the hands of the defendants should be retained by them for the purpose of satisfying a personal claim which they had against him. This question was not in court and never had been, and hence the father was not authorized either by express or implied authority from a court to act as the next friend of the plaintiff. In his capacity simply as a father he could not bind the plaintiff by this release. And even if it be assumed that he was still acting as next friend he could not bind the plaintiff by this release given *in pais*. *Tripp* v. *Gifford*, 155 Mass. 108. The ruling was correct.

Exceptions sustained.

J. J. O'Connor, for the plaintiff.

W. B. Grant, for the defendants.

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CHARLES E. ALLEN, administrator *de bonis non*, *vs.* PURITAN TRUST COMPANY.

Suffolk. January 25, 1911. — March 5, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Probate Court. Judgment. Bank. Equity Jurisdiction.

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator.

In a suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator by checks payable to his own order which he deposited in his individual account with the defendant and used for his own purposes, it is no defense that the surety on the bond of the dishonest administrator negligently failed to require him to perform his duties as administrator, if it does not appear that the defendant had any relations with the surety or knew that it was surety on the administrator's bond; and it is immaterial that the plaintiff had brought suit against the surety and that the surety had paid to the plaintiff the penal sum of the bond, and that the plaintiff and the surety had made an agreement that the surety might sue the defendant in the name of the plaintiff, the surety bearing the expenses of the suit, and that any amount recovered should be divided equally between them.

In a suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator and dishonestly deposited in his individual account with the defendant, it is no defense that the intestate's next of kin made no attempt to keep track of the dishonest administrator or to compel him to account, if it does not appear that there had been any relations of any kind between any of the next of kin and the defendant or that the defendant knew who the next of kin were.

In a suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator and dishonestly deposited in his individual account with the defendant, it appeared that at certain times the dishonest administrator overdrew his individual account with the defendant and on notice of each overdraft deposited in that account a check, for an amount larger than the amount of the overdraft, drawn by him as administrator on the account of the estate with the defendant payable to his own order, and that thereafter the dishonest administrator con-

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tinued to deposit in his individual account such checks thus drawn by him as administrator. A master found that, on and after the date when an overdraft on the individual account first was made good by the deposit of a check drawn on the estate account, the defendant had knowledge of such facts as reasonably would lead it to suspect that the administrator was using without authority funds of the estate for his own private purposes, but he also found that the defendant at no time had any actual knowledge or suspicion that the administrator was making such use of the funds of the estate. *Held*, that the defendant was liable to account to the plaintiff for the whole amount of the checks deposited by the administrator in his individual account out of which the defendant reimbursed itself for the overdrafts, because as to these checks the defendant had profited by and participated in the unlawful acts of the administrator; but that the defendant was not liable for the amounts of other like checks deposited subsequently by the administrator in his individual account and credited to him by the defendant when there were no overdrafts and when on the master's finding the defendant had no actual knowledge or suspicion of the administrator's wrongdoing.

It seems, that a bank, in which an administrator has an account of the estate of his intestate and also an individual account, is not liable to the estate of the intestate for the amount of a check drawn by the administrator to his own order from funds of the estate of his intestate in another bank and dishonestly deposited in such individual account for his own use, if such check is presented in good faith by the bank in which it is deposited to the bank on which it is drawn and is paid without question.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 27, 1908, by the administrator *de bonis non* of the estate of Albert H. Bird, late of Brookline, to recover the amount of certain checks drawn on the defendant and on the First National Bank of Boston by one William L. Baker, as administrator of the estate of the plaintiff's intestate, to the personal order of Baker and indorsed by him and deposited in his personal account with the defendant. The bill prayed that the defendant might be adjudged to be a trustee of the proceeds of these checks and for an accounting and for further relief.

The case was referred to Robert Homans, Esquire, as master. Albert H. Bird died on February 25, 1901. William L. Baker was appointed the administrator of his estate and gave a bond as administrator for $75,000 with the Fidelity and Deposit Company of Maryland, a corporation, as surety. On Baker's first account as administrator, which was filed during his lifetime, no action was taken by the Probate Court until after his death. Baker died on November 3, 1906. Upon Baker's second account as administrator, which was filed by the administrator of his estate, the Probate Court made a decree that the sum of $95,056.69 was

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due from the estate of Baker to the estate of Albert H. Bird. No part of this was paid.

The portion of the master's report relating to two defenses set up in a certain paragraph of the answer, in regard to which exceptions hereinafter quoted were taken by the defendant, were as follows:

"The first of these defenses was that the Fidelity and Deposit Company of Maryland was surety on Baker's bond as administrator; that as surety it had a contract with Baker, under the terms of which Baker agreed to conduct the administration of the Bird estate under conditions imposed by it for its security and that of the persons interested in the estate; that the Fidelity and Deposit Company negligently failed to keep Baker to the fulfilment of his contract with it, or of his duties as administrator; that if it had not been negligent in these respects Baker could not have committed the breaches of trust as alleged in the bill of complaint; that the present suit was brought in part for the benefit of the Fidelity and Deposit Company, and that the plaintiff was barred from recovering anything in this suit because of the negligence of the Fidelity and Deposit Company in the respects before mentioned.

"In support of this defense the defendant offered evidence to show that the plaintiff in this case, after the decree made upon the second account of Baker as administrator, brought suit against the Fidelity and Deposit Company for $75,000, the penal sum named in Baker's administration bond; that thereupon that company paid the plaintiff $75,000, and $150 interest, and entered into a contract with the plaintiff, with the approval of the Probate Court, in the following form: . . .

[The contract referred to was set forth in full, by which the plaintiff agreed to permit the Fidelity and Deposit Company to prosecute at its own expense in his name as administrator *de bonis non* the claims of the estate of Albert H. Bird against the defendant and that any proceeds collected, after deducting the expenses of litigation, should be divided equally between the Fidelity and Deposit Company and the estate of Albert H. Bird.]

"The defendant further offered in evidence, in support of this defense, the application made by Baker to the Fidelity and Deposit Company on the strength of which that company became

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surety on Baker's bond as administrator. [This application was annexed.]

"After offering this application in evidence, the defendant offered to show that the Fidelity and Deposit Company never examined the inventory of the Bird estate, nor checked up the securities with the inventory; never took possession of or examined the securities; never ascertained from Baker what bank accounts he had opened as administrator; never took any steps to have Baker's first account as administrator acted upon by the Probate Court; never exercised any control over Baker's conduct as administrator, except in respect to the account which Baker had opened with the Faneuil Hall National Bank; never called upon Baker for reports of his receipts and disbursements; never insisted that Baker should comply with the conditions of his probate bond as administrator; and, in general, never kept Baker to the fulfilment of his contract with it or of his duties as administrator. There was, however, no evidence offered before me to show that the defendant had had any relations whatsoever with the Fidelity and Deposit Company. The defendant asked one Sturges, who had been assistant treasurer of the Puritan Trust Company while Baker was its customer, whether he had ever heard that the Fidelity and Deposit Company was surety on Baker's administration bond. I excluded this question, against the defendant's objection. The answer would have been in the negative.

"After hearing the evidence and testimony which the defendant offered in support of this defense, I ruled that the plaintiff's right to recover was in no way affected by the conduct of the Fidelity and Deposit Company, and consequently excluded all the evidence and testimony offered by the defendant in support of this defense.

"The second defense set up by the paragraphs numbered 7 in the defendant's answer was based upon the conduct of the next of kin of Albert H. Bird. The defendant offered evidence to show that there were eleven persons interested in the Albert H. Bird estate, that they all knew of Bird's death within a year after Baker's appointment as administrator, and that no one of them made any attempt to keep track of Baker's acts as administrator, or to compel him to account, or to keep Baker in any way up to his duties as administrator. There was no evidence before me that

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there had been any relations of any kind between any of these next of kin and the defendant, or that the defendant knew who the next of kin were. After hearing the evidence offered, I ruled that the plaintiff's recovery in this action could not be defeated by this conduct of the next of kin. I therefore excluded all the evidence offered in support of this defense."

The "Conclusions" of the master's report were as follows:

"1. All the deposits made by Baker with the defendant to the credit of the Bird estate were of moneys belonging to that estate for which he was accountable as administrator, and of this the defendant had notice by the opening and carrying of the account as 'Estate of Albert H. Bird; Wm. L. Baker, Administrator.'

"2. With the exception of the cheque of December 9, 1903, for $6,100 Baker used his individual account with the defendant for his own private purposes.

"3. The cheques on the Bird estate account set forth in schedule B, annexed to the bill of complaint, as drawn to Baker's own order [amounting to about $28,550] were all so drawn, and, with two exceptions, were all deposited to Baker's individual account with the defendant on the respective dates shown in the left-hand column of the table in the report. The two exceptions were the cheques of June 20, 1903, and July 31, 1906, drawn for $25 and $38.38, respectively, both of which were cashed by the defendant.

"4. Baker, in the following instances, repaid the defendant the overdrafts upon his individual account by the deposit to his individual account of cheques drawn to his own order on the Bird estate account.

Overdraft	Jan.	25, 1902,	repaid	by	deposit	of	$ 200,	Jan.	27, 1902.
"	March	19, 1902,	"	"	"	"	1059,	March	20, 1902.
"	March	29, 1902,	"	"	"	"	1000,	March	31, 1902.
"	June	30, 1902,	"	"	"	"	500,	July	1, 1902.
"	Dec.	23, 1902,	"	"	"	"	50,	Dec.	24, 1902.

. . . . . .

"5. When the defendant in 1902, on January 27, March 20, March 31, July 1, and December 24, received for deposit to Baker's individual account cheques drawn by him to his own order on the Bird estate account and in each instance reimbursed itself therefrom for the amounts Baker owed it on each of these days for overdrafts on his individual account, the defendant thereby, and

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by that alone, had notice that Baker was then paying money owed by him to the defendant with funds belonging to the Bird estate, and was put upon its inquiry as to whether Baker had or had not a right to use those funds for such purposes.

"6. On and after the date when an overdraft on Baker's individual account was first made good by the deposit of a cheque drawn on the Bird estate account, namely, on January 27, 1902, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, cheques to his own order on the Bird estate acco nt, was using without authority funds of the Bird estate for his own private purposes.

"7. At no time, even when it reimbursed itself for Baker's individual overdrafts, did the defendant, in crediting to Baker's individual account cheques drawn to his own order on the Bird estate account, or in cashing the same, have any actual knowledge or suspicion whatever that Baker was using without authority funds of the Bird estate for his own private purposes, and the defendant was not privy to his so using those funds for such purposes.

"8. The defendant must account to the plaintiff for $200, with interest from January 27, 1902; for $1,000, with interest from March 20, 1902; for $1,000, with interest from March 31, 1902; for $500, with interest from July 1, 1902; and for $50, with interest from December 24, 1902. In each instance simple interest at six per cent is to be allowed. Save as aforesaid, the defendant is under no liability to account to the plaintiff."

The defendant's exceptions to the master's report, except the second and third which were waived, were as follows:

"1. To the statement or finding of the master that no other proceedings have been had in the Probate Court affecting the issues in this case, in the matter of the administration of William L. Baker upon the estate of Albert H. Bird, beyond the second administrator's account and the action of the court thereon; the same being inconsistent with the evidence, and with evidence offered by the defendant and excluded by the master."

"4. To the admission in evidence and consideration by the master of the six checks of Baker on the First National Bank, and all evidence relating thereto; the same being inadmissible as evidence and incompetent to charge the defendant.

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"5. To the ruling of the master that the plaintiff's right to recover was in no way affected by the conduct of the Fidelity and Deposit Company, and to the exclusion by him of all the evidence and testimony offered by the defendant in support of this defense; as erroneous in law.

"6. To the ruling of the master that the plaintiff's recovery could not be defeated by the conduct of the next of kin of Albert H. Bird, as shown in evidence, and to the exclusion by him of all the evidence offered in support of this defense; as erroneous in law.

"7. To the finding of the master stated in paragraph 5 of the report, under the head 'Conclusions,' in substance to the effect that the defendant had notice on January 27, March 20, March 31, July 1, and December 24, 1902, that Baker was then paying money owed by him to the defendant with funds belonging to the Bird estate, and was put upon its inquiry as to whether Baker had or had not a right to use those funds for such purposes; as inconsistent with and unwarranted by the law or the evidence.

"8. To the finding stated in paragraph 6 of the report, under the same head, that on and after January 27, 1902, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using without authority funds of the Bird estate for his own private purposes; as inconsistent with and unwarranted by the law or the evidence.

"9. To the finding of the master for the plaintiff for $200, with interest from January 27, 1902; $1,000, with interest from March 20, 1902; $1,000, with interest from March 31, 1902; $500, with interest from July 1, 1902, and $50, with interest from December 24, 1902; and especially to the finding of the master for these respective amounts, for the special reason that they are the amounts of the respective checks of Baker by which overdrafts on his personal account are found to have been reimbursed to the defendant, and in each case largely exceed the amount of the overdraft which is found to have been thereby reimbursed; and the defendant especially excepts to any finding for any amount exceeding the amount of the overdrafts so found to have been reimbursed; all as inconsistent with and unwarranted by the law or the evidence."

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The plaintiff also filed exceptions to the master's report as follows:

"1. For that the master should have found, on the facts reported, that the defendant was liable to the plaintiff for the amount of all checks drawn by Baker as administrator to his own order on the Bird estate account against the defendant bank, and deposited to his personal account in the defendant bank or cashed by the defendant bank.

"2. For that the master should have found, on the facts reported, that the defendant was liable to the plaintiff for the amount of all checks drawn by Baker as administrator to his own order on the Bird estate account against the Fourth [First] National Bank and deposited to his personal account in the defendant bank.

"3. For that the master, though in his sixth conclusion he found and ruled that on and after January 27, 1902, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using, without authority, funds of the Bird estate for his own private purposes, found and ruled that the defendant was not liable for checks thereafter drawn by Baker as administrator to his own order on the Bird estate account against the defendant bank and deposited to his own personal account in the defendant bank or cashed by the defendant bank.

"4. For that the master, though in his sixth conclusion he found and ruled that on and after January 27, 1902, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using, without authority, funds of the Bird estate for his own private purposes, found and ruled that the defendant was not liable for checks thereafter drawn by Baker as administrator to his own order on the Bird estate account against the Fourth [First] National Bank and deposited to his own personal account in the defendant bank.

"5. For that the master, though in his sixth conclusion

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he found and ruled that on and after January 27, 1902, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using, without authority, funds of the Bird estate for his own private purposes, found and ruled that the defendant bank was not privy to Baker's wrongdoing.

"6. For that the master should have found and ruled that if the bank had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using without authority funds of the Bird estate for his own private purposes, it was put upon its inquiry, and was responsible for the amount of all checks thereafter drawn by Baker as administrator against the Bird estate account at the defendant bank, or at the Fourth [First] National Bank, to his own order, and deposited to his personal account in the defendant bank or cashed by the defendant bank."

The case came on to be heard before *Braley*, J., who reserved it upon the pleadings, the master's report and the exceptions thereto for determination by this court.

The case was argued at the bar in January, 1911, before *Knowlton*, C. J., *Morton*, *Loring*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices then constituting the court except *Loring*, J.

E. K. Arnold, (*W. B. Luther* with him,) for the plaintiff.

A. E. Pillsbury & A. Whiteside, for the defendant.

BRALEY, J. The master to whom the case was referred reports, that William L. Baker, the first administrator of the estate of Albert H. Bird, opened two accounts with the defendant. By the terms of deposit as entered on its books, the first stood in his name individually, while the second, consisting wholly of moneys belonging to the estate, appeared in the name of the estate followed by his own name as administrator. But while the money deposited could be disposed of by the defendant subject only to the obligation to pay an equivalent sum on demand, or to his order, the checks of the depositor would not transfer the debt or title to the debt to the payee without the defendant's consent. *Carr*

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v. *National Security Bank*, 107 Mass. 45, 58. *Gregory* v. *Merchants' National Bank*, 171 Mass. 67, 69. *Heath* v. *New Bedford Safe Deposit & Trust Co.* 184 Mass. 481, 483. *Bank of the Republic* v. *Millard*, 10 Wall. 152, 157. *Phœnix Bank* v. *Risley*, 111 U. S. 125. The master finds, that either to reimburse the defendant for overdrafts, or for his own private purposes, Baker as administrator transferred the money of the estate to his personal account by checks drawn to his own order, and that it also accepted checks in similar form drawn on the funds of the estate deposited in a national bank, and credited him with the amounts. The report further states that there was no evidence to show that the administrator had authority in fact to make any of these transfers for his own use, and, there having been none in law, the plaintiff, who is the second administrator of the Bird estate, having been partially reimbursed by the payment of the surety company on the first administrator's bond, brings this bill in equity to recover from the defendant the full amount of the embezzled deposits. The second and third of the defendant's nine exceptions to the report having been expressly waived, we first consider the first, fifth and sixth, which raise the questions whether the finding of the master that the decree of the Probate Court upon the administrator's second account was conclusive as to the amount of Baker's embezzlement, and his rulings that the plaintiff's right of recovery was not affected by the conduct of the surety company, or defeated by the failure of the next of kin of Bird to discover his misconduct and protect the estate, and the exclusion of evidence offered in support of these alleged defenses, were erroneous.

The surety company was obliged to pay the amount fixed by the probate decree until the penal sum was exhausted, and Baker having filed only a first account on which no action was taken by the court until after his death, the decree upon the second probate account, presented by the administrator of Baker's estate, is decisive as to the amount of the defalcation, and cannot be collaterally attacked in the present litigation. R. L. c. 162, § 2. *Bennett* v. *Pierce*, 188 Mass. 186, 187. *Connors* v. *Cunard Steamship Co.* 204 Mass. 310, 322.

If it had not paid, the plaintiff could have sued, and the failure of the next of kin to ascertain, that the estate was being misappropriated, would not have defeated the suit.. *Oberlin College* v.

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Fowler, 10 Allen, 545. *Hayes* v. *Hall*, 188 Mass. 510, 514. *Choate* v. *Arrington*, 116 Mass. 552, 556. The plaintiff if he preferred could resort to the bond, rather than litigate the alleged equitable claims now presented against the defendant, which if fully recovered would have been insufficient to exonerate the surety. By relying on the bond he did not waive his right to proceed subsequently against the defendant, even if by agreement between them the expenses of the present litigation are to be borne by the surety, and if successful, the amount recovered is to be divided in certain proportions for its benefit and the benefit of the estate. *O'Herron* v. *Gray*, 168 Mass. 573. Moreover, the surety would have been subrogated to the excess, after the difference between the penalty of the bond and the amount of the probate decree with the costs of recovery had been satisfied, from any proceeds recovered from the defendant, and could have enforced this right by suit. *Johnson* v. *Bartlett*, 17 Pick. 477. *Hart* v. *Western Railroad*, 13 Met. 99. *Wall* v. *Mason*, 102 Mass. 313, 316. *Thayer* v. *Finnegan*, 134 Mass. 62, 66.

It may be assumed that if the next of kin had been diligent the misconduct of the administrator might have been discovered earlier; but they are not shown to have known of the transactions or been possessed of any information which should have aroused their suspicion, and their inaction by failing to compel the administrator to account, or to inquire as to his administration of the estate did not mislead the defendant, with whom they sustained no contractual relations. *Stiff* v. *Ashton*, 155 Mass. 130.

The agreement of indemnity which Baker gave to procure the contract of suretyship having been for the protection only of the surety, its failure to enforce it does not estop the plaintiff from pursuing the defendant if a participator in the administrator's betrayal of the trust.

But if these exceptions are not tenable, the fourth, seventh, eighth and ninth exceptions present the principal questions upon which the defendant's liability depends. It broadly contends that the master's findings that on and after the date of the first overdraft, which was paid by a check drawn on the estate's account, the defendant if judged from the point of view of a reasonably prudent banker had knowledge of such facts as should have led it to suspect that the funds of the estate were being wrongly used,

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were unwarranted either in law or upon the evidence, and that it cannot be held for any part of the moneys taken by the administrator. The personal property of the estate was held by him in a fiduciary capacity, and the source and nature of the respective accounts were fully disclosed by the contract. *Robins* v. *Hope*, 57 Cal. 493, 497. *Hayes* v. *Hall*, 188 Mass. 510, 511. *J. G. Brill Co.* v. *Norton & Taunton Street Railway*, 189 Mass. 431. *Quinn* v. *Burton*, 195 Mass. 277, 279. And in the discharge of their several duties, which were fully detailed by the master, the officers and agents of the defendant were charged with knowledge of the scope and effect of the various entries relating to the deposit as shown on the defendant's books. *Foster* v. *Essex Bank*, 17 Mass. 479, 489. *Elliott* v. *Worcester Trust Co.* 189 Mass. 542, 545. *East Hartford* v. *American National Bank*, 49 Conn. 539. *Bundy* v. *Monticello*, 84 Ind. 119. *American Exchange National Bank* v. *Loretta Gold & Silver Mining Co.* 165 Ill. 103. *Cutler* v. *American Exchange National Bank*, 113 N. Y. 593. *Duncan* v. *Jaudon*, 15 Wall. 165. *Bodenham* v. *Hoskyns*, 2 DeG., M. & G. 903. *Pennell* v. *Deffell*, 4 DeG., M. & G. 372. *Bailey* v. *Finch*, L. R. 7 Q. B. 34. If the primary relation was that of debtor and creditor, nevertheless on the face of a specific contract the money belonged to the estate, and the defendant must be held to have known, that if the administrator appropriated it to his own use the appropriation would be a breach of his trust. *Shaw* v. *Spencer*, 100 Mass. 382. *McCarthy* v. *Provident Institution for Savings*, 159 Mass. 527. *O'Herron* v. *Gray*, 168 Mass. 573. *Gerard* v. *McCormick*, 130 N. Y. 261. *National Bank* v. *Insurance Co.* 104 U. S. 54. The money due to the defendant for overdrafts was paid with its knowledge and consent by checks drawn on the administrator's account, which were in excess of the debt, and were correspondingly credited in his private account. If, as the defendant urges, the legal title to the personal property of the estate was in the administrator, the beneficial interest was in the next of kin of the intestate, who not only could demand but could enforce an accounting. R. L. c. 150. *Bard* v. *Wood*, 3 Met. 74. *Choate* v. *Jacobs*, 136 Mass. 297. *Silsby* v. *Young*, 3 Cranch, 249. And the nature of the fund was not changed by its having been diverted, and placed to the personal credit of the administrator. *Morrill* v. *Raymond*, 28 Kans.

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415. *National Bank* v. *Insurance Co.* 104 U. S. 54. *Union Stock Yards Bank* v. *Gillespie*, 137 U. S. 411. *Bailey* v. *Finch*, L. R. 7 Q. B. 34. It is not a sufficient answer, that, if inquiry had been made, doubtless the administrator might have given an explanation which would have appeared to be reasonable. Having notice of the trust, the defendant was dealing with trust funds, and was bound by the information which it could have obtained if an inquiry had been pushed until the truth had been ascertained. *Shaw* v. *Spencer*, 100 Mass. 382, 389, 391. *Loring* v. *Brodie*, 134 Mass. 453, 459. *Ex parte Kingston*, L. R. 6 Ch. 632. The transformation of the account in the manner adopted was furthermore a voluntary participation on the part of the defendant with an agreement to credit and pay the amount of the excess to Baker individually. The defendant places much reliance upon the case of *Gray* v. *Johnston*, L. R. 3 H. L. 1, where a single check on the funds of the estate having been drawn by the executrix not to her individual order, but to the order of the firm to whose membership she succeeded on the death of her husband, the defendant was held not to be responsible for the misappropriation, as it might well have been assumed by the bank, that the check was properly given in settlement of the accounts between the partnership and her husband's estate. The decision in *Fillebrown* v. *Hayward*, 190 Mass. 472, rests upon the ground that the defendant received the checks of the treasurer drawn on funds of the corporation in payment of his individual debts in good faith, and without any actual knowledge or information which should have put her upon inquiry as to the source from which he obtained the sums sent her. So also in *Batchelder* v. *Central National Bank*, 188 Mass. 25, the single justice found, that the bank had no reason to believe that the trustee who deposited the check in his individual account, which was payable to his own order as trustee, was acting dishonestly, while in *Newburyport* v. *Spear*, 204 Mass. 146, the city treasurer having paid his own debt by a check drawn against the city's funds, it was said, that "in the absence of suspicious circumstances the bank had no duty to concern itself with that subject." In the present case, however, during a period from January 25, 1902, to December 23, 1902, there were numerous checks differing in amount, but each of the same general tenor and fraudulent

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nature, and two distinct accounts plainly indicating the different capacities in which Baker transacted business with the defendant. The payments to itself, with the accompanying transfers from the estate's account to his private account could not have been accomplished without the active instrumentality of the defendant. If the doctrine of constructive notice has no application where there is no duty of inquiry resting upon the banker, the fifth and sixth general findings establish the fact, that the unlawful transfers were made under such conditions, that the defendant was charged with knowledge of the irregularities. *Kennedy* v. *Green*, 3 Myl. & K. 699. *Wood* v. *Carpenter*, 101 U. S. 135.

The findings having been amply warranted by the master's statement of the evidence are decisive as to the defendant's knowledge, as well as of its participation, for which it must be held accountable. *Greenfield School District* v. *First National Bank*, 102 Mass. 174, 176. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *National Revere Bank* v. *Morse*, 163 Mass. 383, 385. *Regester's Sons Co.* v. *Reed*, 185 Mass. 226, 227. The principle governing the defendant's liability is, that a banker who knows that a fund on deposit with him is a trust fund cannot appropriate that fund for his private benefit, or where charged with notice of the conversion join in assisting others to appropriate it for their private benefit, without being liable to refund the money if the appropriation is a breach of the trust. *Shaw* v. *Spencer*, 100 Mass. 382. *Fisher* v. *Brown*, 104 Mass. 259, 261. *American Exchange National Bank* v. *Lorette Gold & Silver Mining Co.* 165 Ill. 103. *American National Bank* v. *Fidelity & Deposit Co.* 129 Ga. 126. *Swift* v. *Williams*, 68 Md. 236. *Duckett* v. *National Mechanics' Bank*, 86 Md. 400. *Bank of Greensboro* v. *Clapp*, 76 N. C. 482. *Ihl* v. *Bank of St. Joseph*, 26 Mo. App. 129, 141. *Commercial & Agricultural Bank* v. *Jones*, 18 Texas, 811. *East Hartford* v. *American National Bank*, 4 Conn. 539. *Bundy* v. *Monticello*, 84 Ind. 119. *Ward* v. *City Trust Co.* 192 N. Y. 61. *Farmers' Loan & Trust Co.* v. *Fidelity Trust Co.* 86 Fed. Rep. 541. *National Bank* v. *Insurance Co.* 104 U. S. 54. Compare *Goodwin* v. *American National Bank*, 48 Conn. 550.

The master's seventh general finding, that the defendant did not have any actual knowledge or suspicion that the administrator by the subsequent transfers was misappropriating the funds of

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the estate, and that it was not privy to them, is not inconsistent with the fifth and sixth findings, and disposes of the plaintiff's further contention, that the defendant should be charged with the amount of these embezzlements. We are not unmindful of the strength of the plaintiff's argument, that even if the defendant was under no obligation to supervise the application of the money, yet it could not have been compelled to honor and credit his individual account with checks drawn on trust funds to his individual order by which the numerous fraudulent transfers from one account to the other covering a period of two years were effected, and that by the respective contracts of deposit the individual and representative accounts were plainly distinguishable. *Thatcher* v. *State Bank*, 5 Sandf. 121. *Chicago Marine & Fire Ins. Co.* v. *Stanford*, 28 Ill. 168, 173. *Gerard* v. *McCormick*, 130 N. Y. 261. *Hunt* v. *Maniere*, 34 Beav. 157, 160. But while upon their face these circumstances well might have led the defendant to suspect that a misappropriation was taking place, and that money of the estate was being applied to the administrator's private use, the question whether the defendant had notice of the irregularities was one of fact, and the master's finding not appearing to be clearly wrong should not be reversed. *Greenfield School District* v. *First National Bank*, 102 Mass. 174, 176. *Fillebrown* v. *Hayward*, 190 Mass. 472.

The five checks drawn by Baker to his own order on funds of the estate deposited in a national bank, which the defendant discounted, and placed to his individual credit are also covered by the master's finding. It presented the checks in good faith to the bank on which they were drawn, and had the right to rely on the representation of the bank by the payment of the money, that the checks were not being used for Baker's personal advantage. R. L. c. 73, §§ 69, 72, 73. *Havana Central Railroad* v. *Knickerbocker Trust Co.* 198 N. Y. 422.

The exceptions of each party to the master's report, therefore, must be overruled, and the report confirmed, and the defendant is to be charged only for the amounts received in payment of the overdrafts and the amounts transferred to Baker's individual account in the settlement of the overdrafts with interest from the dates stated in the report.

Decree accordingly.

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EDWARD D. PAGE & others *vs.* WHITTENTON MANUFACTURING COMPANY & others.

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Suffolk. December 12, 1911. — March 8, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Corporation, Rights of common and preferred stockholders. *Equity Jurisdiction*, To enforce rights of minority of stockholders of corporation.

Where the capital stock of a corporation consists of eight thousand shares of common stock and two thousand shares of preferred stock, and in case of liquidation the holders of the common stock have no right to share in the corporate assets until the holders of the preferred stock have received the full value of their shares with cumulative dividends thereon, the holders of a majority both of the common and of the preferred stock, acting in good faith for the benefit of the corporation, lawfully may adopt and carry out a plan for raising money necessary for the continuance of the business of the corporation, by reducing the amount of the common stock to one thousand shares and providing for the issue of three thousand shares of new common stock at par, the preferred stockholders to have the right to subscribe for one new share for each old share and the common stockholders to have the right to subscribe for one new share for each share of the common stock after the reduction, representing eight of the old shares, and a minority of the stockholders, whose holdings are principally of the common stock, cannot maintain a suit in equity to enjoin the majority from carrying out the plan, although its result will be to diminish greatly the relative number of shares and the voting power of the complaining stockholders.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 25, 1911, by the holders of forty-six per cent of the common stock and about twelve per cent of the preferred stock of the defendant corporation, to restrain the defendant corporation and the individual defendants as the holders of about fifty-three and one half per cent of the common stock and about fifty-three and one half per cent of the preferred stock of the defendant corporation from carrying out a plan, approved by the directors, to raise additional capital for the defendant corporation by reducing its common stock from eight thousand shares to one thousand shares and then increasing such common stock to four thousand shares by issuing three thousand shares of common stock at par, the preferred stockholders to have the right to subscribe for one new share for each old share and the common stock-

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holders to have the right to subscribe for one new share for each share of common stock after the reduction, representing eight of the old shares.

The case was referred to James D. Colt, Esquire, as master. The important facts found by him are stated in the opinion. The plaintiffs filed exceptions to the master's report relating to certain findings of fact made by the master.

The case was heard by *Morton*, J., who made a memorandum of decision as follows: "I see nothing inequitable or unjust in the proposed scheme. The master finds that the net value of the common stock, after the proposed reduction, will not be in excess of $100 a share, and that the proposed scheme, if carried out, will result in no pecuniary gain to the defendants, except in so far as it will enable the company to conduct its business profitably in the future. He finds that the defendants have a little more than a majority now of each class of stock, and that if the proposed reduction and increase are carried through, and they take what they will be entitled to, they will then only have a little more than a majority of each class of stock. He finds that, owing to their having very much less of the preferred stock, the plaintiffs will lose in voting power. But that seems to me to be unavoidable. The master finds that the defendants are acting in entire good faith, and I see nothing to lead me to question the correctness of that finding. Under the proposed plan every stockholder, common and preferred, will have the right to subscribe for his proportion of the increase, and if a majority of the stockholders of each class think that the plan that is proposed is, under all the circumstances, the best plan, and vote to adopt it, I do not see how the rights of the minority are interfered with. The result is that I think that the exceptions to the master's report should be overruled, the temporary injunction dissolved, and the bill dismissed, and it is so ordered."

By order of the justice a final decree was entered accordingly; and the plaintiffs appealed.

A. Hemenway, (*A. G. Mitton* with him,) for the plaintiffs.

W. L. Putnam, (*J. L. Putnam* with him,) for the defendants.

BRALEY, J. The master reports, and the plaintiffs concede, that the vote of the directors to call a meeting of the stockholders to reduce, and then increase the common capital stock was not

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in pursuance of a scheme devised by the individual defendants to deprive the plaintiffs, who are minority stockholders, of their proportionate interest, and to reduce the value of their stock. It also must be held under the allegations of the bill, that the questions raised by the plaintiffs' exceptions were properly considered by the master as involved in the suit, and, the evidence not having been reported, his findings so far as material should not be reversed. The report leaves no doubt that the financial condition of the company required new capital, or there was danger of liquidation, and that the plan proposed by the directors for submission to the stockholders is not only feasible, but will afford the relief desired. But if the defendants acted in good faith, and funds sufficiently ample to pay corporate debts and to purchase new machinery were needed, the plaintiffs contend that the plan inevitably creates an unjust discrimination between the different classes of stock and gives to the preferred stock an undue advantage at the expense of the common stock. It being averred in the bill and admitted by the answer, that the individual defendants own a majority of the entire capital stock, the adoption of the plan by the stockholders is reasonably certain, and the plaintiffs were not required to await the result of the meeting before seeking injunctive relief. *Rogers* v. *Nichols*, 186 Mass. 440.

To decide the questions presented it becomes material to inquire into the corporate powers and organization of the company, and to ascertain the relative rights of the plaintiffs as holders of the common stock. The master states, that the capital consists of ten thousand shares each of the par value of $100, divided into eight thousand shares of common and two thousand shares of preferred stock. The preferred stock is entitled to six per cent cumulative dividends before any dividend is payable on the common stock, and, if more than six per cent on both classes becomes available for dividends, the preferred stock is to share the excess equally with the common stock. If the corporation goes into liquidation, the holders of the common stock are postponed in the distribution of assets, until the holders of the preferred stock have received the value of their shares with all accumulated dividends. Before the enactment of the St. of 1902, c. 441, preferred stock was unknown to our general laws relating to the organization and powers of manufacturing corporations,

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although in some instances which are referred to in *American Tube Works* v. *Boston Machine Co.* 139 Mass. 5, 9, this right had been granted by special charter. See also St. 1885, c. 349; *Field* v. *Lamson & Goodnow Manuf. Co.* 162 Mass. 388. The date of the company's incorporation is not given, but we assume from statements in the report that it was organized under the general laws without any classification of its capital, St. 1851, c. 133; Gen. Sts. c. 61; St. 1870, c. 224; Pub. Sts. c. 106; R. L. c. 110, and that in accordance with the provisions of §§ 40 and 41 of the St. of 1903, c. 437, which by § 95 repealed the St. of 1902, c. 441, the agreement of association was lawfully amended dividing its stock into the classes and proportions as previously stated. By § 27 of this statute, "every corporation may create two or more classes of stock with such preferences, voting powers, restrictions and qualifications thereof as shall be fixed by the agreement of association . . . or in an amendment to said agreement or articles which may be adopted as hereinafter provided." But if authority is conferred to classify capital, the expediency of issuing two classes of stock, and the proportions which each class shall bear to the entire capital, and the preferences to be given to one class over the other, are left wholly to the associates who organize the corporation and become parties to the agreement of association in which the extent and character of the preference must be expressed, or to the determination of two thirds of all its stock at a meeting called for the purpose where the agreement of association is so amended after organization as to provide for such classification. St. 1903, c. 437, §§ 7, 8, 40, 41. It is to be inferred that the preliminary requirements of §§ 40 and 41 were followed, and the company, having been empowered to create preferred shares, could give such shares a preference, not only as to dividends, but as to repayment of capital and accumulated dividends in the event of liquidation. The provision thus adopted constituted a contract between all the stockholders and the company for the division of profits and assets. *Williston* v. *Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. *Roberts* v. *Roberts-Wicks Co.* 184 N. Y. 257. *McGregor* v. *Hotel Ins. Co.* 6 Stew. 181. *Hackett* v. *Northern Pacific Railway*, 140 Fed. Rep. 717. *In re Bangor & Portmadoc Slate & Slab Co.* L. R. 20 Eq. 59. *In re Barrow Haematite Steel Co.* 39 Ch. D. 582, 602; [1900] 2 Ch.

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846. *In re Quebrada Railway, Land & Copper Co.* 40 Ch. D. 363. And § 26 recognizes this relation by requiring that each original certificate, and each subsequent certificate of preferred stock and of common stock, shall have plainly written or stamped upon it a sufficient statement of the preference or limitation. By § 40 the power to reduce or increase the capital is authorized upon a majority vote of each class of stock, and under the proposed plan to raise new capital without increasing the authorized capital, it would be necessary to reduce, and then to increase, the capital stock in such proportions as would produce the sum required. The plan, while not so expressed in terms, operates as a partial liquidation which would have to be borne equally by both classes of stock if the preference had been limited only to dividends. *Griffith* v. *Paget*, 6 Ch. D. 511. But the common stock cannot participate in any distribution of assets until the stipulated priority of the preferred stock as to both dividends and assets has been satisfied. If by the shrinkage of quick assets or of working capital, even if not sufficient to cause general liquidation, new capital must be raised by first reducing the outstanding capital and then increasing it within the authorized limit, the common stock, which under the contract assumed the burden, must be first resorted to even to the point of extinction before the preferred stock can be compelled to contribute. *Roberts* v. *Roberts-Wicks Co.* 184 N. Y. 257. *McGregor* v. *Hotel Ins. Co.* 6 Stew. 181. The power to reduce having been exercised, the capital stock then would be fixed at the amount of the reduction, which would leave the preferred shares unimpaired, while the common stock would be reduced from eight thousand to one thousand shares. It would then be lawful to increase the capital stock, and to issue new shares of common stock equivalent to the amount of the reduction. St. 1903, c. 437, § 40. When this had been accomplished all the stockholders would stand on a footing of equality except so far as preferential rights had been conferred, and in the distribution of new shares the holders of both classes of stock should be given the same option of subscription, which by the plan was rightly based as to the common stock not on the original number of shares, but on the number of such shares outstanding after reduction and cancellation. *Mason* v. *Davol Mills*, 132 Mass. 76. *D'Ooge* v. *Leeds*, 176 Mass. 558. *Jones* v. *Concord*

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& Montreal Railroad, 67 N. H. 119. *Stokes* v. *Continental Trust Co.* 186 N. Y. 285.

A majority of the entire stock can determine whether the plan proposed shall be adopted, not for the benefit or advantage of either class of stock, but, as the master finds, to enable the company to continue its business. The common stockholders held their shares subject to the rights of the preferred stockholders, and it is apparent that the individual defendants are not actuated by a desire to exercise their power of control in wanton disregard of the rights of the minority. If the disparity between them is increased by the necessary apportionment, the shrinkage in the number and value of their holdings, with the consequent loss of voting power, results from the proper and reasonable exercise by the company for its own benefit of the powers conferred by the statute. *Field* v. *Lamson & Goodnow Manuf. Co.* 162 Mass. 388, 395.

The decree of the single justice which overruled the plaintiffs' exceptions, confirmed the report and dismissed the bill should be affirmed with costs.

Decree accordingly.

GEORGE B. BAKER & others *vs.* ROBERT E. DAVIE & others.
WILLIAM H. JACKSON *vs.* ROBERT E. DAVIE & others.

Suffolk. January 12, 15, 1912. — March 11, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Estoppel. Pledge. Custom. Equity Jurisdiction, Fraudulent pledge, Marshalling of assets. *Corporation,* Transfer of shares.

Where there is a custom, that a certificate of shares in a corporation accompanied by an instrument of power of transfer signed in blank by the person named in the certificate as owner, in the possession of a person who is known and is of good reputation, "if the signature is guaranteed by a stock exchange house," is treated as "capable of good transfer and delivery by such holder" for sale or pledge, the owner who has entrusted such a certificate and power of transfer to such a holder is estopped to deny the title of a pledgee who took the certificate and power of transfer from the holder under such custom in good faith. In the present case it was held that the operation of the estoppel was not affected by certain representations made by the holder of the certificate as to his right to use the stock, or by the fact that the guaranty of the signature

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of the owner of the certificate by the stock exchange house on the power of transfer was procured without the knowledge of the owner after its delivery to the holder.

In a suit in equity to enforce an alleged equitable pledge of certain shares of a corporation in the possession of a trust company subject to a prior pledge to the trust company, it appeared that the shares were transferable only on the books of the corporation on surrender of the certificate, that the owner of the shares, in whose name they stood, entrusted the certificate together with an instrument of transfer and power of attorney signed by him in blank to a stockbroker, then known as of good reputation, that the stockbroker dishonestly pledged the shares for his own benefit to the trust company, which took them in good faith under a custom by which such a certificate with an instrument of transfer executed and witnessed as this one was "when in the possession of a person who is known and is of good reputation," is treated "when offered for sale, pledge or transfer . . . as capable of good transfer and delivery by such holder for such sale or pledge," and that thereby the owner of the shares was estopped to deny the validity of the pledge to the trust company. Later the stockbroker, in consideration of the promise of the plaintiff not to sue him at that time for money which he owed the plaintiff, executed an assignment in writing to the plaintiff of all his "right, title and interest" in the shares of stock pledged by him to the trust company, subject to the rights of that company as pledgee. Before accepting this assignment, the plaintiff went to the trust company and inspected the certificate of stock and the instrument of transfer and gave notice to the trust company of the assignment. *Held*, that there was no pledge to the plaintiff because there was no delivery, and that the owner of the shares was not estopped to assert his title as against the plaintiff, because the custom had no application when the person to whom the owner had delivered the certificate and the instrument of transfer no longer was in possession of them, and because the instrument of transfer from the owner to the stockbroker did not transfer the title to the shares but only a right to acquire such title by surrendering the old certificate to the corporation and obtaining a new one.

In a suit in equity by the owner of certain shares of stock held by the defendant under a pledge from a dishonest stockbroker which the plaintiff under a custom is estopped to deny, if it appears that the broker who pledged the plaintiff's shares to the defendant also pledged to the defendant to secure the same indebtedness other shares of stock to which the broker had the title, the shares to which the broker had title first should be resorted to in satisfying the defendant's claim before applying the shares to which the plaintiff has the title subject to the pledge.

TWO BILLS IN EQUITY, filed in the Superior Court on November 18 and 21, 1910, the first by the members of the firm of Baker, Ayling and Company against Robert E. Davie, William H. Jackson, Henry I. Harriman, the Federal Trust Company, a corporation, and William Wheeler, intervening by petition, and the second by William H. Jackson against Robert E. Davie, the plaintiffs in the first case, the Federal Trust Company and other defendants.

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The cases were referred to George W. Estabrook, Esquire, as master to be heard together, the master to report his findings with such facts and questions of law as either party might request. Exceptions to the master's report were overruled by *Hitchcock*, J. The questions in both suits arose from the frauds and dishonesty of the first named defendant, who at the time of the transactions involved in the suits was about twenty-four or twenty-five years of age and was doing business as a stockbroker in Boston, and who after these transactions absconded. The facts relating to the respective claims of the Federal Trust Company, Baker, Ayling and Company and William H. Jackson are stated in the opinion.

In regard to the transaction between Davie and the defendant Harriman the master found the following facts:

"At the time of making some one of the loans by the Federal Trust Company to Davie, Davie added to the collateral pledged to the Trust Company two hundred shares of the Connecticut River Power Company, a certificate for which was in his possession indorsed in blank by the person named in it as owner, which he had obtained from the defendant Harriman, its holder and actual owner, Harriman having authorized him to pledge it to the Federal Trust Company to secure a loan of $3,000 upon a representation that such use would assist him, Davie, in obtaining membership of the stock exchange. Instead of so doing he pledged it to the Federal Trust Company as collateral to secure $10,000, and also as collateral for all his indebtedness to that company, then amounting to about $41,330, in addition to this new loan of $10,000.

"Harriman learned of the fact of the misuse of the stock soon after such misuse and learned it from Davie, and when so informed, though protesting against such use of the stock, so far acquiesced in the transaction that he did not give any notice of it to the Federal Trust Company but permitted the state of facts to continue, seeking in other ways than by reclaiming the stock to indemnify himself. It is still in the possession of the Federal Trust Company held to secure the same obligations for which it holds the American News Company stock as collateral."

On May 3, 1910, Davie made to Baker, Ayling and Company the assignment which is described in the opinion.

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On June 11, 1910, Davie gave an assignment to the defendants Harriman and Chace of his right, title and interest in the stocks held as collateral by the Federal Trust Company. In regard to this the master found as follows: "I find that neither Harriman nor Chace made any inquiry of the Federal Trust Company, or of Jackson, or any one, as to the stock of the American News Company — or made any examination of the stock or powers — or ever saw them — or knew the name of the certificate's owner — or inquired as to it — or changed position in any way by reason of anything done or omitted by Jackson."

In regard to the assignment held by the defendant Wheeler, the master found the following facts: "The assignment itself was absolute in form and under seal. It was dated the twenty-ninth day of June, 1910, and set over to William Wheeler 'all equity in certain collateral which is held by the Federal Trust Company of Boston, Mass., against a loan amounting to $79,379.20, comprising ten hundred and seventy shares of stock of the American News Company of New York and two hundred shares preferred stock of the Connecticut River Power Company of Maine. Also subject to a lien of Baker, Ayling & Co. . . . amounting to $12,500 now on file with the Federal Trust Company.' Mr. Wheeler made no inquiries of the Federal Trust Company or of Baker, Ayling & Company, and no examination of the certificate and powers of attorney in question, never having seen them until August 20, 1910, subsequently to all his dealings with Davie except one — when he advanced for him at his request one hundred shares of La Salle stock worth $1,000. He made no inquiry as to the ownership of Jackson, the rights of Davie or the restrictions upon the transfers of stock. He knew nothing of Jackson in the matter."

Jackson's seventh and eighth exceptions to the master's report, referred to in the opinion and sustained by this court, were as follows:

"7. For that the master has found that Jackson is estopped against Baker, Ayling and Company from asserting his right to the certificate of American News Company stock until their claim is paid; whereas it appears from the facts found by the master that Jackson was not so estopped, and that Baker, Ayling and Company were not purchasers for value, and that they were

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merely assignees of Davie's right, title and interest in and to said certificate and the proceeds thereof, after payment of the loan to the Federal Trust Company.

"8. For that the master has found that Jackson is estopped from asserting his claim to the American News Company stock pledged to the Federal Trust Company until the value of the La Salle stock, viz: one thousand dollars is paid to William Wheeler; whereas, it appears from the facts found by the master that Jackson was not so estopped, and that William Wheeler was merely assignee of Davie's equity in said stock."

The cases were heard by *Hardy*, J., upon a motion of the Federal Trust Company for confirmation of the master's report and for a decree in accordance therewith. The judge made a final decree. The portions of the decree which were held by this court to be correct were as follows:

"2. That the Federal Trust Company is entitled to hold ten hundred seventy shares of the eleven hundred seventy shares of the American News Company represented by certificate No. 150, and two hundred shares of Connecticut River Power Company preferred stock, now in its possession as security for its loans to said defendant Davie amounting to $79,379.20, with interest thereon at six per cent per annum from August 1, 1910, to the date when said stock shall be redeemed as hereinafter provided, or said stock sold and the proceeds thereof applied to the payment of said loans and interest. . . .

"3. That subject to the rights of redemption hereinafter set forth, said Federal Trust Company may sell, assign and deliver said shares of stock at any brokers board at public auction or private sale at the option of said trust company or its assigns, with the right in said trust company or its assigns to be purchasers at such sale. The Federal Trust Company shall first sell the said two hundred shares of stock of the Connecticut River Power Company, and apply the proceeds thereof, after deducting the costs and expenses thereof, as hereinbefore set forth, to the payment of the amount due it as aforesaid, before selling the one thousand and seventy shares of American News Company stock; and if the proceeds thereof prove to be inadequate for full satisfaction of its claim as aforesaid, it shall then sell the said one thousand and seventy shares of American News Company stock."

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[The remainder of this paragraph, held to be incorrect, related to the payment out of the proceeds of such sale of the claim of Baker, Ayling and Company as provided for in other paragraphs of the decree, also held to be wrong.]

"7. That the defendants Harriman and Chace have no right, title or interest in or to any part of said shares of stock of the American News Company."

"10. That said Federal Trust Company shall hold one hundred shares out of eleven hundred seventy shares of American News Company stock represented by certificate No. 150, now held by it, in trust to turn over the same or an equal number of shares to said Jackson upon any sale, transfer or division of said shares represented by said certificate No. 150, or upon any redemption hereunder by said Jackson.

"11. That said Robert E. Davie owes to William H. Jackson the sum of $107,000, with interest from November 30, 1909, except that if said Jackson shall receive any balance of the proceeds of the sale of the said one thousand and seventy shares of American News Company stock paid to him . . . said balance shall be applied in reduction of the sum hereby adjudged to be due from said Davie; and provided further that in case said Jackson shall redeem said stock hereunder by the payment of any sum less than the amount hereby adjudged to be due from said Davie and that thereupon said stock shall be delivered to him, the difference between the amount so paid by him in redemption and the amount hereby adjudged due from said Davie shall be applied by Jackson in reduction of the sum so adjudged to be due from said Davie."

The defendant Jackson appealed from the decree, particularly to the portions of it omitted above relating to the payment of the claim of Baker, Ayling and Company. The intervening defendant Wheeler and the defendants Harriman and Chace also appealed.

C. Warren, (*G. Perry* with him,) for Jackson.

W. M. Noble, (*A. S. Davis* with him,) for Wheeler.

S. H. Pillsbury, for Harriman and Chace.

E. R. Anderson, for Baker.

J. P. Fagan, (*J. E. Cotter* with him,) for the Federal Trust Company.

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RUGG, C. J. These suits involve the rights of various persons in certain shares of stock. The occasion for litigation arises from the perfidy of Robert E. Davie. William H. Jackson was the owner of eleven hundred and seventy shares of the American News Company, for which he held a single certificate in ordinary form, stating among other things that it was "transferable only on the books of the company, by him or his attorney, on surrender of this certificate." He was induced by fraudulent representations of Davie, of such nature that as between the two no title or right to use for his own benefit passed to Davie, to hand to the latter this certificate, together with two instruments, each signed in blank by himself. These are called "powers of attorney and transfer" and although printed as a single document, they consist of two parts, the first being a bargain, sale and transfer of the stock and the second being an irrevocable power of attorney to sell and make over all or any part of the stock and to do all things necessary to accomplish that purpose. The one of these now material was a transfer of ten hundred and seventy of the eleven hundred and seventy shares of stock represented by the certificate. The name of the transferee and attorney was left blank.

Davie signed as witness to Jackson's signature and, after having the signature guaranteed by a firm of stockbrokers, used the certificate and instrument of transfer as collateral, on which he borrowed large sums of money from the Federal Trust Company. The physical possession of the certificate and instrument has continued in the trust company at all times. Davie, during these transactions, was a stockbroker of good reputation in Boston and well known to all the parties to these suits.

The master found that "where a certificate of stock is in the possession of a person who is known and is of good reputation . . . and . . . where the one holding such certificate is in possession of a separate instrument of power and transfer signed by the person named in the certificate as owner, applicable to such stock with blank spaces left for the apparent purpose of adapting the paper to the transfer of stock when filled appropriately — it is the custom in Massachusetts — at least if the signature is guaranteed by a stock exchange house and is witnessed, when offered for pledge, sale or transfer, to treat them as capable

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of good transfer and delivery by such holder for such sale or pledge."

1. It is plain that upon these findings the Federal Trust Company became entitled to all the rights of a pledgee of the ten hundred and seventy shares of stock, no matter how faithless Davie had been to his agreement with the owner, by which he secured possession of the stock and the instrument.

The case falls within *Scollans* v. *Rollins*, 179 Mass. 346, and *Russell* v. *American Bell Telephone Co.* 180 Mass. 467. The principle of law established by these cases is that if the owner of stock knowingly places in the hand of another the certificate therefor, either indorsed in blank or by a separate instrument of transfer and power of attorney, the person to whom the certificate and instrument are delivered can pass a good title by delivery or pledge regardless of the relations between him and the owner. This is not on the ground that the certificate becomes a negotiable instrument, but on the ground of estoppel, because the owner, having given another such indicia of title as clothes him with the appearance of ownership, is precluded from setting up title in himself as against a holder in good faith.

Jackson seeks to distinguish the present case in that the language used by Davie at the time of procuring the loan from the Federal Trust Company was sufficient to put the latter on inquiry and to indicate that his title was less than might have been assumed if nothing had been said. The circumstance on which he relies is that Davie stated to the Federal Trust Company at the time of obtaining from it the first and subsequent loans "that stock was practically his." "This stock is all right." "This was given to him all right, given to him to use in the market." "It was given to him to use." "He had the right to use that stock." The master specifically finds that the trust company acted in good faith. This language does not show any limitation upon what appeared to be the rights of Davie under the instrument signed by Jackson in the light of the custom proved. There is nothing in it to suggest that he did not actually possess, with reference to the certificate, the rights which he undertook to exercise. It cannot be said fairly to derogate from the power to transfer the absolute title which, by the words of the instrument in connection with the custom, he appeared to have.

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It is further argued in behalf of Jackson that the custom proved in the case at bar is essentially different from that found in *Scollans* v. *Rollins* and *Russell* v. *American Bell Telephone Co.*, in that it prevails with certainty only "if the signature is guaranteed by a stock exchange house" and that as the guaranty of his signature by the stock exchange house was procured by Davie without the knowledge of Jackson and after the delivery of the instrument to him, Jackson is not prevented, under the somewhat strict rules of estoppel, from setting up title in himself. Entrusting the certificate to Davie in blank was, so far as innocent third persons are concerned, an authorization so to fill the instrument as to make it effective to accomplish its apparent purpose. The guaranty of signature must necessarily be made after the signing and is something with which the owner has no apparent connection. It appears to be chiefly a safeguard against forgery.

2. After the certificate had been in the possession of the Federal Trust Company for about four months, Davie became indebted to the firm of Baker, Ayling and Company in large sums, on account of which they threatened action against him. In return for their promise not to bring action at the time, he executed an assignment to Baker, Ayling and Company of "All my right, title and interest in and to all securities now or hereafter pledged by me with the Federal Trust Company . . . and now consisting of ten hundred seventy (1070) shares of the capital stock of the American News Company and two hundred (200) shares of the preferred stock of the Connecticut River Power Company of Maine, subject, however, to all the rights of the Federal Trust Company to hold the same as collateral." Before accepting this assignment, Baker, Ayling and Company went to the Federal Trust Company and inspected this certificate of stock and instrument signed by Jackson. They thereupon gave notice to the Federal Trust Company of the assignment to them by Davie.

A certificate of stock indorsed in blank is not negotiable. It is not governed by the law as to negotiable instruments. It is the evidence of ownership of personal property. Title to the shares of the American News Company, under the form of certificate here disclosed, could be actually transferred only upon the books of the company upon surrender of the certificate. There was, therefore, at common law no completed transfer of title by Jack-

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son, even though he signed the instrument. Apart from controlling custom, this is the common law of this Commonwealth and of England. *Scollans* v. *Rollins*, 173 Mass. 275, 278, 279. *France* v. *Clark*, 26 Ch. D. 257. *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20. *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, 343. *Colonial Bank* v. *Cady*, 15 App. Cas. 267, 273, 277, 278, 285. See *Fox* v. *Martin*, 64 L. J. (N. S.) Ch. 473.

That position is the starting point. Baker, Ayling and Company show no right to the shares unless they get beyond this point. But there is a controlling custom found to exist in the case at bar. They rely upon that as giving them rights. That custom is that a certificate in the condition in which this one was "when in the possession of a person who is known and is of good reputation," is treated "when offered for sale, pledge or transfer . . . as capable of good transfer and delivery by such holder for such sale or pledge." The arrangement between Davie and Baker, Ayling and Company was not a pledge. It is elementary that physical possession is essential to the existence of a pledge. The physical possession of this certificate has remained at all times in the Federal Trust Company. The transaction between Davie and Baker, Ayling and Company was in writing. It purported to be a transfer directly from him to them, subject to the rights of the trust company, of his rights in the stock. It was not at this time in the "possession" of Davie, but of the trust company. The custom governs, however, only when the certificate is in the "possession" of the person undertaking to pass title. Moreover, the further terms of the custom are that when offered for sale or transfer it is "capable of good transfer and delivery." While transfer may be in some connections a word of broad significance, it means accurately a passing over of a thing, which implies something more than a constructive act. Delivery also means commonly an actual change of physical custody. That "transfer and delivery" as used in the phrase expressing the custom are to be construed as referring to manual change in the holding of the certificate is confirmed by the words immediately following, namely, "by such holder." The only "holder" before mentioned is the person in "possession"of the certificate. The custom establishes the law on a basis somewhat different from that, which would otherwise govern the rights of the parties. Hence, it is to

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be interpreted and applied, not as a loose rhetorical expression, but as a rule of law. So interpreted, it means that title to the stock passes when the certificate and instrument of transfer actually pass from one hand to another. It does not cover the case where the one to whom it was originally delivered by the owner, no longer in possession of it by reason of having parted with it in pledge to a third person for less than its full value, undertakes to deal with the value in excess of the pledge by a symbolical transfer to still another person. This is the reasonable interpretation of the custom as applied to the circumstances here disclosed. It appears to be in harmony with the policy of the Commonwealth as now established by the Uniform Stock Transfer Act, St. 1910, c. 171, §§ 1, 5, 18, 22, which, however, is not applicable to this transaction. This conclusion is fortified slightly by the form of the instrument given by Davie to Baker, Ayling and Company, which was not in terms a transfer of the entire value of the stock above the pledge to the trust company, but was only of his "right, title and interest." These words have acquired in deeds a certain and definite meaning. They convey whatever title the grantor has, be it much or little, and that alone. As words of grant they are limited to the estate and interest of the grantor. They do not impart ownership in fee or any other particular extent of proprietorship. *Allen* v. *Holton*, 20 Pick. 458, 464. *Sweet* v. *Brown*, 12 Met. 175. *Hubbard* v. *Apthorp*, 3 Cush. 419. *Commonwealth* v. *Brown*, 15 Gray, 189. *Hoxie* v. *Finney*, 16 Gray, 332. *Barnstable Savings Bank* v. *Barrett*, 122 Mass. 172. *Spreckels* v. *Brown*, 212 U. S. 208, 211. The same rule has been held to apply to sales of personal property. *First National Bank* v. *Massachusetts Loan & Trust Co.* 123 Mass. 330.

It is urged, in behalf of Baker, Ayling and Company, that Jackson ought to be as much estopped to assert his title against them as against the trust company. There are two difficulties with this contention. The first is that they rely and must rely upon the custom, and not upon the terms of the instrument of transfer. That appears plainly from the two reports of *Scollans* v. *Rollins*, 173 Mass. 275, and 179 Mass. 346. If they do not come within the terms of the custom, they must fail. The second is that the transfer signed by Jackson, which they examined in the hands of the Federal Trust Company before agreeing to suspend their ac-

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tion at law and to take this assignment from Davie, was not in truth a transfer of title from Jackson. It merely transferred a right which enabled Davie to acquire a legal title by surrendering the old certificate to the company and getting a new one. Jackson still continued to be the only shareholder recognized by the company. This was pointed out clearly by Lord Watson, in *Colonial Bank* v. *Cady*, 15 App. Cas. 267, at 277, 278. The indorsement of a certificate of stock or an instrument of transfer, where title to the stock is transferable only on the books of the company, of itself is an equivocal act. It may mean, apart from custom, something less than or quite different from a transfer of title. 173 Mass. 279. For this reason *Stiff* v. *Ashton*, 155 Mass. 130, has no application. Unless there is a delivery of possession of the certificate, the usual rule applies, that possession of personal property by a third person is not evidence of title, and the owner is not estopped from asserting his rights. This does not impinge upon the rule that when an owner has so acted as to mislead a third person into the honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth, because here the extent to which the innocent third person could have been misled depends wholly upon the custom. *Jarvis* v. *Rogers*, 13 Mass. 105; *S. C.* 15 Mass. 389, is distinguishable from the case at bar, for there the certificates were transferable merely by indorsement under a rule of the company. *Gardner* v. *Beacon Trust Co.* 190 Mass. 27, is distinguishable on the ground that a negotiable security was there in litigation. The rule established by custom as to certificates of stock is an exception to the general rule. It does not apply to other brokers or persons invested with possession. *Rogers* v. *Dutton*, 182 Mass. 187, 189. *Cooke & Sons* v. *Eshelby*, 12 App. Cas. 271, 277. *Foley* v. *Smith*, 6 Wall. 492.

The argument does not seem to be sound, that it must follow from this position that stock pledged as security in a collateral trust mortgage cannot be held on request of a bondholder. The trustee or mortgagee who holds the stock under such circumstances would stand as the Federal Trust Company does here, and would be responsible to all beneficiaries.

The suggestion that the Federal Trust Company may be treated as the agent of Baker, Ayling and Company does not appear tenable upon the facts of these cases.

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3. The grounds upon which this judgment rests as to Baker, Ayling and Company dispose adversely of the claims of the other defendants without adverting to distinctions between them.

4. The marshalling of assets provided for in the decree was correct in principle. Davie wrongfully used two hundred shares of Connecticut River Power Company stock procured by him from Harriman as security for his loans from the Federal Trust Company, but Harriman assented to this use after knowledge, and does not now claim any priority to this stock on that account. The stock of the American News Company is more than sufficient to satisfy the claims of the trust company. In behalf of Baker, Ayling and Company, who hold the first assignment from Davie, it may be urged that this stock should first be resorted to by the trust company on the "equitable rule . . . that a person having a right to satisfy his debt or claim out of two funds, to but one of which another person can resort, shall be compelled first to exhaust the fund to which the other cannot resort before coming upon the one available to both." *Carter* v. *Tanners Leather Co.* 196 Mass. 163, 166. This rule, however, does not apply where the two funds are not derived from a common source or do not belong to a common debtor. The American News Company stock and the Connecticut River Power Company stock do not belong to a common debtor, for the former is the property of Jackson, the right of the trust company to resort to it arising only by estoppel under the custom, while the latter belonged to Davie. Davie being primarily liable, stock to which he had title should first be resorted to. *Smith* v. *Savin*, 141 N. Y. 315.

The result is that exceptions seventh and eighth of Jackson to the master's report should be sustained, and otherwise the master's report should be confirmed, and all other exceptions to it be overruled, and that paragraphs 2, 6, 7, 10 and 11 of the decree of the Superior Court are correct; paragraph 3 is correct, except the concluding portion which orders payment to Baker, Ayling and Company; and the remaining paragraphs are wrong.

Decree reversed and details of new decree in accordance with this opinion to be fixed in the Superior Court.

So ordered.

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JOSEPH W. BATTELLE *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another.

Norfolk. November 16, 1911. — March 12, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Deed, Construction. *Easement*. *Way*, Private. *Land Court*. *Railroad*.

In a deed conveying to a railroad corporation two parcels of land adjoining on either side the location of its railroad, the granting clause and the habendum clause were in the usual and proper terms to convey the land in fee. Following the description of the land was the following clause: "It is hereby intended to convey the above premises to the said railroad company to be used for a public road and depot and railroad purposes only. Reserving to the grantor, her heirs and assigns, the use of said granted premises for ingress and egress to and from her land adjoining." There was a clause of general warranty which excepted from its operation only "the aforesaid reservations." On acquiring the land the railroad corporation constructed across it a public road and over a part of it built a railroad station. Afterwards the station was destroyed by fire and was rebuilt on other land but it was approached from the highway over the land in question. *Held*, that, subject to the right of ingress and egress reserved for the benefit of the grantor's adjoining land, the land was conveyed to the railroad corporation unconditionally in fee simple.

A grantor conveyed to W certain lots of land together with the fee in half of a town way adjoining one of them, "reserving to herself and her heirs and assigns all right to the aforesaid town road opposite the last named lot of land, in case the said road be discontinued, allowing the said W to pass and repass to and from his land." The town way was discontinued, and the fee in half of the part of it opposite the lot passed to the successor in title of the grantor. The title of W had passed to another person. *Held*, that such half of the part of the old town way was subject to a right of passing and repassing appurtenant to the land formerly of W, the right of way not having been personal to W but having been granted in fee with the land to which it was appurtenant under the habendum clause of the deed to him as a part of the estate out of which the reservation was carved.

Under R. L. c. 128, § 18, as amended by St. 1905, c. 249, § 2, the Land Court may register the title to an estate in fee in land under a railroad location, although the rights of the railroad corporation, assuming them to have been acquired by eminent domain, are substantially permanent and practically exclusive so long as the land is used for the purposes of a railroad.

PETITION, filed in the Land Court on November 30, 1910, for the registration of the title to certain land in the town of Needham, lying between the Charles River and the station of the New York, New Haven, and Hartford Railroad Company at

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Charles River Village, on both sides of a travelled way known as Fisher Street.

The case was heard by *Davis*, J., who made an order for a decree for the petitioner in accordance with the rulings which are stated in the opinion, and reported the case for determination by this court. The questions presented by the report and the facts relating to them are stated in the opinion.

R. W. Hale, for the petitioner.

A. W. Blackman, for the respondent railroad company.

F. J. Tuttle, for the respondent Defren.

DeCourcy, J. The report of the judge of the Land Court presents three questions for our determination.

1. The first issue is between the petitioner and the New York, New Haven, and Hartford Railroad Company and involves the construction of a deed. The facts that raise the question of law are stated in the decision of the Land Court as follows: "The principal controversy is in regard to the ownership of certain portions of the land claimed by the petitioner on either side of the railroad location which were covered by a deed given by Mary Battelle, predecessor in title to the petitioner, to the Boston, Hartford and Erie Railroad Company, predecessor in title to the respondent railroad, dated July 21, 1866. By this deed Mary Battelle, in consideration of $175, gave, granted, bargained, sold and conveyed unto the said railroad a tract of land on the north of the centre line of the railroad location containing sixty-seven square rods, and an adjoining tract of land on the south side of said centre line containing sixty-two square rods. Following the description of the two parcels the deed recited: 'It is hereby intended to convey the above premises to the said railroad company to be used for a public road and depot and railroad purposes only. Reserving to the grantor, her heirs and assigns, the use of said granted premises for ingress and egress to and from her land adjoining.' Then followed the usual habendum clause, 'to the said railroad company their assigns, to their own use and behoof forever.' Shortly after this deed was given the railroad company made material changes in the grade of its roadbed, blocking up an old road which had run along the river bank and building a new one through the tract so conveyed, and building partly within the limits of the land described in said deed, and partly

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within the limits of its adjoining railroad location, a depot. This depot was maintained until within a short time before this action was brought, when it burned down, and a new station has been erected on land a short distance to the southeast, taken from the petitioner for station purposes in January, 1910, under the provisions of chapter 463 of the Acts of 1906."

The petitioner contends that said deed conveyed to the grantee only a use "for a public road and depot and railroad purposes" and reserved a resulting use to the grantor; and that the language of the deed and the intention of the parties require such construction. We are of opinion that the judge was right in ruling that by the deed in question title to the land therein described passed to the railroad company in fee simple. The deed evidently was prepared by a person skilled in conveyancing. The granting clause and the habendum were in the usual and proper terms to transfer a fee, and the general warranty, by the use of the words "except the aforesaid reservations," reserved from its operation only "the use of said granted premises for ingress and egress to and from her land adjoining." If it was the grantor's purpose to have the title of the land she was selling revert to her unless the use of the property for railroad purposes should be perpetual, she naturally would have inserted in the deed a technical common law condition and not a mere statement which at most is a covenant or agreement. *Rawson* v. *Uxbridge*, 7 Allen, 125. *Barker* v. *Barrows*, 138 Mass. 578. *French* v. *Quincy*, 3 Allen, 9.

So far as the surrounding circumstances throw light upon the fair meaning of the instrument, they indicate that the parties intended a conveyance of the fee and not of a mere easement or restricted use. Presumably the grantor was paid full value for the land, and the grantee's purpose in buying it was to make changes in grade, construct a new public road and build a railroad station, all of a permanent character. And although the present station stands on other land it is approached from the highway over the locus.

The Land Court was right in ruling that, subject to rights of ingress and egress reserved for the benefit of the grantor's adjoining land, this deed passed title in fee simple to the lozenge shaped tract; and that the petitioner is not entitled to register

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as appurtenant to his remaining land any right over the parcel in question except said rights of ingress and egress.

2. The petitioner's mother, the whole of whose title he now has, by deed dated October 14, 1864, conveyed to one Welch, the predecessor in title of the respondent Defren, two pieces of land together with that half of the fee in a town way which adjoined one of them. Following the description in the deed is this clause: "The said Battelle reserving to herself and her heirs and assigns all right to the aforesaid town road opposite the last named lot of land, in case the said road be discontinued, allowing the said Welch to pass and repass to and from his land."

The judge of the Land Court found that this town way was discontinued in or about 1867, and ruled that the title to that part of the fee of the old town way which is referred to by this deed is in the petitioner. He also ruled that it is all subject to a right of passing and repassing appurtenant to such portion of the land now of Defren as was conveyed to Welch by the deed under consideration. The correctness of this latter ruling is now before us.

The narrow question is whether this right of way was personal to Welch. The deed to Welch conveyed to him a title in fee not only in the two lots of land but also in one half of the town way which adjoined one of them. Mrs. Battelle did not attempt to retain the fee in the road by excepting it from her grant. In order that such fee might become vested in her in case the road should be discontinued she inserted in her deed a reservation or implied grant, which expressly enured to "her heirs and assigns." *Ashcroft* v. *Eastern Railroad,* 126 Mass. 196. The right to pass and repass over this road when discontinued was plainly left in Welch, from whose title the reservation to Mrs. Battelle was carved; and this right, together with his title to the two lots, was one that enured to his heirs and assigns by force of the habendum in his deed. This same result was arrived at by the Land Court by construing the clause in the deed as an agreement for the benefit of the land and as creating a right in perpetuity; *Bailey* v. *Agawam National Bank,* 190 Mass. 20; but we prefer to rest it upon the ground above stated. The court rightly ruled that the title to that part of the fee of the old town way which is referred to by this deed is in the petitioner, but that it is all subject to a right of passing and repassing appurtenant to such

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portion of the land of Defren as was conveyed to Welch by the deed in question, and must be so registered.

3. The judge found that the petitioner showed title to the fee under the railroad location and under its station location; and ruled that the statute permitted the registration of such a fee subject to such easements. The land registration statute provides that "application for registration of title may be made by . . . the person or persons who claim . . . to own the legal estate or easements or rights in land held and possessed in fee simple." R. L. c. 128, § 18, as amended by St. 1905, c. 249, § 2. And see R. L. c. 128, §§ 89, 90. The finding of the Land Court that the petitioner has an estate in fee is conclusive upon us under this report, and brings the petitioner's title within the express wording of the statute. The rights of the defendant acquired presumably by eminent domain, whether defined as easements or otherwise, are substantially permanent and practically exclusive so long as its location is used for the purposes of a railroad, and we are not to assume that these rights will be impaired in the final decree for the petitioner. *Boston & Maine Railroad* v. *Hunt*, 210 Mass. 128. *Newton* v. *Perry*, 163 Mass. 319.

The rulings and decision of the Land Court are affirmed and a final decree is to be entered accordingly.

So ordered.

ADDA P. UPSON, administratrix, *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. January 9, 10, 1912. — April 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Practice, Civil, Amendment. *Negligence*, Employer's liability, Causing death.

Under R. L. c. 173, §§ 48, 121, the writ and declaration, in an action by an administrator against the employer of the plaintiff's intestate for negligence causing the death of the intestate, may be allowed to be amended by substituting the widow of the employee as the plaintiff and alleging a cause of action under R. L. c. 106, § 73, for negligence causing the instantaneous death of the employee.

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TORT by the administratrix of the estate of Louis M. Upson to recover for the death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant when the intestate was in the employ of the defendant as an assistant station agent and telegraph operator at Pepperell on February 9, 1909. Writ dated March 19, 1909.

In the Superior Court the case was tried before *King*, J. At the close of the plaintiff's evidence it was agreed that there was sufficient evidence to warrant a finding of liability under R. L. c. 106, § 73, and that there was not sufficient evidence to justify a finding for the plaintiff at common law. There was evidence that a notice under the employers' liability act was duly served by the plaintiff upon the defendant on March 15, 1909.

The plaintiff, who was the widow of her intestate, moved, at the close of her evidence, to amend her writ and declaration by striking out all parts alleging that she was the administratrix of the estate of her husband, so that she personally should be the plaintiff, and by adding a fifth count under R. L. c. 106, § 73, as the widow of Louis M. Upson, alleging that he was in the employ of the defendant and was instantly killed through the negligence of a person in the service of the defendant who was in charge of a signal, switch, locomotive or train upon the defendant's railroad.

The judge allowed the motion, subject to the defendant's exception, and found, subject to exceptions by both parties, that it was intended by the person drawing the writ and declaration at the time the action was brought to avail himself of the benefit of both the employers' liability act and of St. 1907, c. 392.

By agreement of the parties the judge ordered a verdict for the plaintiff in the sum of $2,000, and reported the case for determination by this court; with the stipulation that if the judge had authority to allow the amendment to the writ and declaration, judgment was to be entered for the plaintiff in the sum of $2,000; and that, if the judge did not have such authority, judgment was to be entered for the defendant.

R. H. Sherman, for the plaintiff.

F. N. Wier, for the defendant.

HAMMOND, J. This case is before us upon a report; and the question is whether the court had the authority to allow the

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amendment substituting the widow as the plaintiff in the place of the administrator and adding the fifth count to the declaration.

The court had the authority, if the purpose of the amendment was to enable the plaintiff to "sustain the action for the cause for which it was intended to be brought." What was the cause of action for which the action was intended to be brought? In a broad sense it was the death of the intestate by reason of negligence for which the defendant was answerable in damages to the widow. If the negligence was at common law, then the remedy under St. 1907, c. 392, was by an action to be brought by the administrator, but for the benefit of the widow (*Vecchioni* v. *New York Central & Hudson River Railroad*, 191 Mass. 9); if under the employers' liability act, then the remedy was by an action to be brought in the name of the widow. R. L. c. 106, § 73. In either case the damages were to be assessed according to the degree of culpability, were to be paid by the defendant and received to the use of the plaintiff. The object of this action was to get this money for the widow from the defendant for the negligent killing of her husband. This object seems to have been pursued with confused ideas, but at the close of the evidence it was agreed that there was sufficient evidence to warrant a finding under the employers' liability act but not at common law. And under the circumstances the amendment was allowed.

Even if, as the defendant argues, the plaintiff's counsel was inclined to think that the remedy was under St. 1907, c. 392, still it is manifest that the purpose of the amendment was to maintain the action for the cause for which it was intended to be brought, namely, to enforce the liability of the defendant to pay money to the plaintiff for negligence in causing the death of her husband. And the substance of the various findings by the judge is to this effect. The judge therefore had the power to allow the amendment. R. L. c. 173, §§ 48, 121.

Judgment on the verdict.

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JOSEPH E. ROBERTS *vs.* ANHEUSER BUSCH BREWING ASSOCIATION.

214 178
d 214 - 179
214 - 266
216 - 402

Suffolk, January 17, 18, 1912. — April 1, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Food, Injurious substance sold for. *Deceit. Negligence. Practice, Civil*, Report to full court.

If the manufacturer of a preparation of malt represents as of his own knowledge by public advertisements that it is a healthful mixture, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment, and puts the mixture on the market, whereby a bottle of it comes through a wholesale dealer to a druggist who sells it to a customer, who is induced to buy it by the representations contained in the manufacturer's advertisements, and if the contents of the bottle, free from outside contamination and used in the way intended by the manufacturer, cause ptomaine poisoning of the customer's wife and child, the customer has a right of action in tort against the manufacturer for loss of services thus caused.

In an action of tort the presiding judge ordered a verdict for the defendant and reported the case for determination by this court, stating that he did so "under the usual agreement," and that "It is agreed that if judgment should be entered for the plaintiff it is to be for the sum of $300." This court, having decided that there was evidence which entitled the plaintiff to go to the jury, *held*, that it could not be said that there was any "usual agreement," and that, as the terms of the report did not indicate plainly what the effect of the determination of this court should be, there should be a new trial.

TORT for loss of services of the plaintiff's wife and child through the alleged wrongful and negligent acts of the defendant as set forth in the declaration printed below. Writ dated July 14, 1904.

The declaration was as follows:

"And the plaintiff says that on or about April 2, 1903, the defendant extensively advertised a food preparation of malt and hops known as 'Malt Nutrine' as being manufactured and prepared by the defendant with great care and as being compounded in such a manner that the same was extremely healthful and nutritious for women and children requiring nourishment and strength.

"And the plaintiff says that on or about said date, relying upon such representations, the plaintiff purchased a bottle of said 'Malt Nutrine' and had the same given to his child, John Joseph Roberts, the plaintiff's servant, and to his wife.

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"And the plaintiff says that said 'Malt Nutrine' was so improperly and negligently compounded by the defendant that the same contained poisonous and deleterious substances so that when the contents of said bottle, purchased by the plaintiff as aforesaid, was given to the child and wife of the plaintiff, as aforesaid, the said wife and child of the plaintiff became suddenly and terribly ill and suffered great pain of body and mind from the effects of which the said child of the plaintiff, as aforesaid, died and from the effects of which the wife of the plaintiff, as aforesaid, has been caused and will be caused to suffer great pain of body and mind and has been permanently injured.

"And the plaintiff says that the injury and death to the plaintiff's child, as aforesaid, was caused by the negligence and improper compounding of said 'Malt Nutrine' by the defendant in consequence of which said bottle of 'Malt Nutrine' contained poisonous and deleterious substances. That by reason of said injuries to the plaintiff's wife and child, as aforesaid, the plaintiff has lost the services of his said child and has lost and will lose the services, comfort and assistance of his said wife and has been put to great costs and expenses for medical services and attendance all to his great damage."

In the Superior Court the case was tried before *Morton*, J. There was an answer in abatement on the alleged ground that the action was not brought properly in the county of Suffolk. This was overruled by the judge and the defendant excepted. The facts which could have been found upon the plaintiff's evidence are stated in the opinion.

The defendant offered no evidence. The judge ordered a verdict for the defendant, and reported the case for determination by this court. After a statement of the evidence, the report of the judge closed as follows: "This being all the material evidence I directed a verdict for the defendant and under agreement of the parties I report the case for the consideration of the Supreme Judicial Court under the usual agreement. It is agreed that if judgment should be entered for the plaintiff it is to be for the sum of $300."

O. Storer, for the plaintiff.

E. F. McClennen, for the defendant.

SHELDON, J. While there may be no inherent difficulty in main-

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taining an action of tort upon a false warranty (*Farrell* v. *Manhattan Market Co.* 198 Mass. 271, 274, and cases cited), it yet remains true that there cannot be a warranty where there is no privity of contract. It cannot be found that there was a particular contract where there was no contract whatever. As there was here no contractual relation between the plaintiff and the defendant, the action cannot be maintained upon the ground that there was any warranty by the defendant of the good qualities of its mixture. *Davidson* v. *Nichols*, 11 Allen, 514, 516, 517. Nor did the plaintiff state such a cause of action. His declaration is in tort.

There was evidence that the defendant had by advertisements represented that its mixture was healthful, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment, and that it was compounded with great care. These representations could be found to have been made as of the defendant's own knowledge. It could be found that the plaintiff had seen some of these advertisements, and we cannot say that the jury might not have found that his purchase of a bottle of the mixture was upon the faith of and in reliance upon these representations. There was also evidence, although meagre, tending to show that this bottle had been put upon the market by the defendant and had come from it through a wholesale dealer to the druggist who sold it to the plaintiff. It also could be found that the sickness of the plaintiff's wife and child was due to ptomaine poisoning, caused by the contents of this bottle, though as to the last point it is true that the evidence was but meagre. Still it was for the jury to pass upon. If this sickness was due to ptomaine poisons contained in a bottle which had come from the defendant, there was evidence of the falsity of its representations.

If these facts were found in accordance with the plaintiff's contention, there might have been a verdict in his favor. If the defendant made such representations as of its own knowledge, and put its mixture upon the market to come through wholesale and retail dealers to the ultimate consumers, who in reliance upon such representations bought and drank the mixture in the manner intended by the defendant, these representations must be regarded as continuous, intended to be accepted and relied on by all who finally should purchase the article for their own consumption. This rule often has been declared. *Wellington* v. *Downer Kerosene*

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Oil Co. 104 Mass. 64. *Norton* v. *Sewall*, 106 Mass. 143. *Bishop* v. *Weber*, 139 Mass. 411, 417. *Thomas* v. *Winchester*, 6 N. Y. 397. *Blood Balm Co.* v. *Cooper*, 83 Ga. 457. *Langridge* v. *Levy*, 2 M. & W. 519. *George* v. *Skivington*, L. R. 5 Ex. 1. Here, as in *Thomas* v. *Winchester*, 6 N. Y. 397, the sale was made by the defendant, if the facts above stated were established, to a dealer in drugs who was expected to put it upon the market so that it finally would be sold to some one for his own consumption, and the defendant's representations must be treated as made to that ultimate consumer, upon whom the injurious consequences of their falsity would fall, and might cause either death or serious bodily harm. This is the rule stated in the well considered case of *Tomlinson* v. *Armour & Co.* 46 Vroom, 748. Indeed the case at bar is stronger for the plaintiff than that last cited, for in that case the defendant was held upon the implied representation that its ham was wholesome and fit for food, while here there were express representations by the defendant as to the excellent qualities of its mixture.

But it is claimed that these representations should not be given an indefinite continuance, and that this bottle either was or might have been so long out of the possession of the defendant that its representations ought to have been regarded as no longer in force when the plaintiff made his purchase. There may be a lapse of time after which this fairly could be maintained; but it cannot be held as matter of law that such was the case here. The bottle was corked with a stopple which had to be pulled out by the plaintiff after the seal over it had been removed by his wife. This would indicate that any outside contamination had been guarded against, and might tend to relieve a purchaser from any fear of such contamination. This contention presents only a question of fact.

In our opinion the case should have been submitted to the jury. See besides the cases already cited, *Gould* v. *Slater Woolen Co.* 147 Mass. 315; *Farrell* v. *Manhattan Market Co.* 198 Mass. 271; *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341; *Gately* v. *Taylor*, *ante*, 60; *Beckwith* v. *Oatman*, 43 Hun, 265; *Brown* v. *Marshall*, 47 Mich. 576; *Salmon* v. *Libby, McNeill & Libby*, 219 Ill. 421; and *Howes* v. *Rose*, 13 Ind. App. 674.

The case was reported to this court "under the usual agreement," and with the agreement "that if judgment should be entered for

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the plaintiff it is to be for the sum of $300." The parties differ as to what "the usual agreement" is. It is not unusual for a report to provide for judgment in favor of one party or the other; neither is it unusual to provide for a new trial if the rulings made below are found to have been erroneous. While the agreement as to the amount of a possible judgment for the plaintiff tends strongly to support his contention, we cannot say that there is any "usual agreement." The report of a case "for determination by the full court" (R. L. c. 173, § 105) ought to indicate plainly what is to be its effect. As the case stands, we are of opinion that there should be a new trial.

No question has been made upon the answer in abatement.

New trial ordered.

JAMES E. YOUNG *vs.* CANADA, ATLANTIC AND PLANT STEAMSHIP COMPANY, Limited.

§ 214 - 289
cc 216 - 409

Norfolk. February 27, 1912. — April 1, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Corporation, Delegation of authority by directors, Executive committee. *Contract*, What constitutes.

The charter of a foreign steamship corporation authorized its directors to appoint annually "from among themselves an executive committee, for such purposes and with such powers and duties as the directors by by-law may determine," and provided that the president should be *ex officio* a member of such executive committee. Under this authority the directors enacted a by-law which created an executive committee consisting of the president and two of the directors, who were given the "full powers of the board of directors when said board is not in session." The by-law did not prescribe that all three members should participate in the action of the committee. In an action against the corporation on an alleged contract to employ the plaintiff for one year at a certain salary as marine superintendent of the defendant's business of transportation, there was evidence that a vote to employ the plaintiff on the terms alleged was passed at a meeting of the executive committee when the board of directors was not in session. It could have been found that all three of the members of the committee were present when the meeting opened but that one of them had "stepped out" when the vote was taken. The jury found that the executive committee passed the vote adopting the alleged contract. *Held*, that the making of the contract in question was a part of the ordinary management of the defendant's

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business which could be delegated by the directors to an executive committee, and that the authority of the committee could be exercised by the majority, even if the third member was not present when the vote was taken.

CONTRACT for the breach of an alleged contract to employ Charles E. Pye, the plaintiff's assignor, for one year from the making of the contract in June, 1903, as marine superintendent of the defendant's transportation business and to pay him for such services the sum of $3,600, alleging also that on March 19, 1909, Pye made an assignment in writing to the plaintiff of his claim against the defendant. Writ dated May 10, 1909.

In the Superior Court the case was tried before *Aiken*, C. J. The defendant was a corporation, established under the laws of the Province of Nova Scotia. The charter and by-laws of the defendant were put in evidence, and contained the following provisions:

From the charter:

"Sec. 7. (1) At the annual general meeting, the shareholders assembled who have paid all calls due on their shares shall choose five persons to be directors of the Company; but the Company may, by by-law, first approved of by the shareholders, increase the number of directors to any number not exceeding fifteen, and a majority of such directors shall be a quorum.

"(2) The directors may annually appoint from among themselves an executive committee, for such purposes and with such powers and duties as the directors by by-law determine, and the president shall be *ex-officio* a member of such executive committee."

From the by-laws:

"Sec. 7. The affairs of the Company shall be under the control of a board of seven directors, elected by the shareholders by stock ballot. The directors so elected will choose from among their number a President and Vice-President. They will also appoint a Treasurer and Secretary, who shall perform such duties as may be required by the President, Board of Directors or Executive Committee.

"Sec. 8. The Directors shall annually appoint from among themselves two directors, who with the President, shall form an Executive Committee, and said committee shall have full powers of the Board of Directors when said Board is not in session."

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These by-laws were in force in June, 1903. The other material facts which could have been found on the evidence are stated in the opinion.

At the close of the evidence the defendant asked for twenty-eight rulings, as referred to in the opinion. The first four rulings requested were as follows:

"1. As a matter of law the plaintiff cannot maintain this action and the verdict must be for the defendant.

"2. On all the evidence the plaintiff cannot maintain this action and the verdict must be for the defendant.

"3. The plaintiff has not proved the making of the contract declared on and the plaintiff cannot, therefore, recover.

"4. The plaintiff has not proved any vote of either the stockholders or directors to employ Pye for a year, and, therefore, the plaintiff cannot recover."

The judge refused to make any of these rulings. He submitted to the jury three special questions, which with the answers to them were as follows:

"1. Did the executive committee pass the vote of June 15, 1903?" To which the jury answered, "Yes."

"2. Did the executive committee pass the vote of June 16, 1903?" To which the jury answered, "No."

"3. Was the employment by the month or by the year?" To which the jury answered, "By the year."

The vote of June 15, 1903, referred to in the first question, was relied upon by the plaintiff as making with Pye the contract sued upon. The alleged vote of June 16, 1903, referred to in the second question, was relied upon by the defendant and purported to make with Pye a contract of different character.

The jury returned a general verdict for the plaintiff in the sum of $3,575.50. The defendant alleged exceptions.

The case was submitted on briefs.

W. M. Richardson, for the defendant.

F. P. Garland, for the plaintiff.

BRALEY, J. If the evidence introduced by the plaintiff was believed, the jury were warranted in finding that Charles E. Pye, the plaintiff's assignor, was employed for the term of one year at a salary of $3,600, as marine superintendent of the company's business of transportation, and that after he had rendered services

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for a little more than three months the board of directors voted to discharge him and to abolish the office. It also having been shown, that his discharge was not due to any neglect or incompetency in the performance of the duties of the office, and that for a year thereafter, although making diligent efforts, he was unable to obtain other remunerative employment, the plaintiff ordinarily would be entitled to substantial damages for the breach. *Lopes* v. *Connolly*, 210 Mass. 487. But the defendant contends, as matter of law, that no valid contract existed, or if a contract was entered into, it was mutually modified or discharged by a subsequent agreement. We shall discuss these defenses in the order stated.

The defendant is a foreign corporation, and by its charter and the by-laws adopted by the stockholders, the directors were entrusted with full control and management of the affairs of the corporation. The charter among other provisions authorized the directors to appoint annually "from among themselves, an executive committee for such purposes and with such powers and duties as the directors by by-law may determine, and the president shall be *ex-officio* a member of such executive committee." Acting under this express sanction the board enacted a by-law which created an executive committee consisting of the president and two of the directors, who were given the "full powers of the board of directors when said board is not in session." The nature of the defendant's business appears to have been such that authority to act for the corporation in the ordinary management of its affairs could be delegated by the directors to an executive committee. It accordingly is immaterial whether the committee could exercise all the powers of the board, as the language of the by-law conferred upon them full authority, subject to the limitation, to employ Pye as superintendent of transportation. *McNeil* v. *Boston Chamber of Commerce*, 154 Mass. 277. *Nash* v. *Minnesota Title Ins. & Trust Co.* 159 Mass. 437. *Sheridan Electric Light Co.* v. *Chatham National Bank*, 127 N. Y. 517. *Canada Atlantic & Plant Steamship Co.* v. *Flanders*, 145 Fed. Rep. 875. *Union Pacific Railway* v. *Chicago, Rock Island & Pacific Railway*, 163 U. S. 564, 597, 598. It was with this committee, sitting when the board was not assembled, that the alleged contract was made. If the power of the committee to bind the defendant is

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manifest, they acted without a secretary, and the evidence was conflicting as to the proceedings. It was an issue of fact whether the vote to hire Pye for the term and at the salary stated was passed. The answer of the jury to the first question established the contract, unless the meeting was void for informality. The jury, however, could find that all three of the members were present when the meeting opened, and the by-law not having prescribed that all must participate, the temporary absence from the room, or even the withdrawal of one of their number when the vote was taken,* did not invalidate the action of the majority, by which the company is bound. *McNeil* v. *Boston Chamber of Commerce*, 154 Mass. 277. *Metropolitan Telephone & Telegraph Co.* v. *New York & New Jersey Telephone Co.* 17 Stew. 568, 573. *Burleigh* v. *Ford*, 61 N. H. 360. *Andres* v. *Fry*, 113 Cal. 124.

Nor can the defendant overcome the effect of this vote, the terms of which Pye, who was present, accepted, by setting up the previous agreement of the syndicate in control of the company, in which he joined, that the combined salaries of the officers should not exceed an expenditure of $10,000 a year. The defendant was not bound by an instrument to which it was not a party, while it furthermore appears that when the salary had been fixed the gross amount had not been exceeded.

It was undoubtedly within the power of the parties to change and modify the terms of the contract. The answer of the jury, however, to the second question disposes of the defendant's contention, that by a subsequent agreement, instead of being payable absolutely in money, the salary was to be derived in part from the proceeds of sales of stock of the company held by the syndicate, and that the contract was not to be for a year but by the month, and upon notice was terminable at the will of either party.

The averment of payment in the answer, which seems to have been treated at the trial as being in the nature of an accord and satisfaction, is the remaining defense. It is important in this connection to remember, that the jury in answer to the third question

* There was evidence that one of the members of the committee "stepped out" when a motion to appoint him agent of the executive committee at a salary of $5,000 a year, was voted on. This member testified that he did not remain while any votes were taken.

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found the hiring to have been for the year, and not from month to month, and that this special finding is in harmony with their answers to the first and second questions. If it be assumed, that the receipts given by Pye, and the checks payable to his order on account of salary at a less rate than the amount which he claimed, contained respectively the words "in full of the above account," and "in full to date," among which was the check received and indorsed after he had been notified by the company of his discharge, there would have been evidence of a settlement of a disputed claim which would have barred any greater or further liability. *Boston* v. *Ocean Steamship Co.* 197 Mass. 561, 564. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 209 Mass. 105. The unequivocal testimony for the plaintiff, that these phrases were not in the papers when they were signed by Pye, but were subsequently interpolated without his consent, left the jury to determine whether there had been a mutual satisfaction, and their general verdict for the plaintiff sufficiently indicates that they did not accept the defendant's theory of the evidence.

The defendant also asked for twenty-eight rulings, which were not given except as shown in the charge, and it excepted to the refusal, and to the instructions where the requests were not covered, but now waives the thirteenth, fourteenth, fifteenth, sixteenth, nineteenth, twentieth and twenty-second requests. A verdict could not have been ordered for the defendant under the first four requests, nor for reasons sufficiently stated could it have been ruled that the contract declared on was invalid, or had been abandoned. The right of the plaintiff to recover rested upon the vote, its acceptance, and the performance of the duties required of Pye, until he was wrongly discharged, and no question of the ratification of an invalid contract by the conduct of the company's officers in making payments to him was involved in the questions submitted by the judge to the jury. The weight of the evidence and the credibility of witnesses were solely within the province of the jury, and the question whether a different result ought to have been reached is not for us to decide. We find no error in the denial of the requests in so far as they were not embodied in the instructions, which were full and sufficiently favorable to the defendant.

Exceptions overruled.

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MARK BURSTEEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 6, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Evidence, Matters of common knowledge, Judicial notice. *Railroad. Street Railway*, Operation in subway.

The court here took judicial notice of the fact that cars in the Boston subway stop only at fixed stations.

It is right for the conductor of a surface car, which has started from a station in the Boston subway and has moved about two feet with another car coming about twenty feet behind it, to refuse to stop the car or to allow a passenger to leave it in order that the passenger may recover a valuable violin, which in its case has slipped from under his arm and has fallen from the car.

TORT for the loss of a violin with its case on May 17, 1909, when the plaintiff was a passenger on a car of the defendant at the Park Street subway station in Boston. Writ dated July 15, 1909.

In the Superior Court the case was tried before *Dana*, J. The plaintiff testified that on May 17, 1909, he entered the subway at Park Street as a passenger, and in the usual way boarded, by the rear entrance, a closed north bound surface car of the defendant carrying his violin in its case under his arm; that as he was entering the body of the car from the platform the conductor rang the bell, the car jerked, he tried to grab a handle and his violin fell out from under his arm; that the violin fell upon the platform of the car, thence to the concrete platform of the subway station, and thence to the car track behind the car; that as soon as the violin fell, he notified the conductor of the dropping of his violin, and asked the conductor to stop the car and allow him to recover it; that at the same time, when the car had not gone more than a distance of two feet and while the car was in motion, he tried to leave the car and for that purpose to open the outside door of the vestibule of the car which the conductor was in the act of closing; that the conductor refused to stop the car, and refused to allow the plaintiff to leave the car, and held the vestibule door shut so that the plaintiff could not open it or leave the car, and told the

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plaintiff, "We are not allowed to stop our cars in the subway;" that, when the plaintiff's violin dropped from the car to the tracks, another surface car of the defendant was coming along about twenty feet behind the car which the plaintiff had boarded; that, when the plaintiff got to the next subway station, at Scollay Square, and was allowed to leave the car, he immediately went back to where his violin had dropped in order to find it, but that it had disappeared and never was recovered. No negligence in the manner in which the car started was asserted by the plaintiff.

At the close of the evidence, the judge ordered a verdict for the defendant, with the stipulation by consent of the parties, that, if the ruling was wrong, judgment was to be entered for the plaintiff in the sum of $150; and that, if the ruling was right, judgment was to be entered for the defendant.

L. S. Thierry, for the plaintiff.

C. Brewer, for the defendant.

SHELDON, J. The plaintiff does not contend that the jerk of the car and the resulting fall of his violin were due to any negligence of the defendant. His claim is that the conductor ought to have stopped the car and allowed the plaintiff to alight and at least attempt to recover his property. But this contention cannot be maintained.

The occurrence was in the Boston subway, where it is generally known, and we must take judicial notice, that the cars stop only at fixed stations, and all cars are run with the expectation that there will be no other stops. In this very case, another car was coming only about twenty feet behind the car in question. A sudden stop of the forward car would have involved imminent danger of a collision, and would have exposed both the plaintiff and the other passengers in each car to the risk of serious injuries. The established rule that a railroad company is not bound to stop a train between stations for the purpose of allowing a passenger to search for lost property, even of great value, governs the case. *Henderson* v. *Louisville & Nashville Railroad*, 123 U. S. 61. Here as in that case the property lost was in the personal custody of the passenger, and the defendant's tracks in the subway are used in the same way as the tracks of a steam railroad upon the surface of the earth. As in that case, the plaintiff had no right to require the defendant, for the purpose of relieving him from the con-

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sequences of an accident for which it was not responsible, to stop its car "short of a regular station, to the delay and inconvenience of other passengers, and the possible risk of collision." And see *Lake Shore & Michigan Southern Railroad* v. *Pierce*, 3 Am. & Eng. R. Cas. 340, 342; *Wells* v. *Alabama Great Southern Railroad*, 40 Am. & Eng. R. Cas. 645; *Alabama Great Southern Railroad* v. *Carmichael*, 90 Ala. 19, 24.

The case of *Chicago West Division Railway* v. *Hughes*, 69 Ill. 170, has no resemblance in its facts to the case at bar.

There is no merit in the contention that the defendant by not allowing the plaintiff to alight was guilty of a false imprisonment for which it now can be held. The declaration states no such cause of action, and what the conductor did was not wrongful.

Judgment on the verdict.

MARY F. MURPHY *vs.* JOHN M. DUGGAN.
SAME *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 6, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Street railway, In use of highway. *Practice, Civil*, Ordering verdict.

At the trial together of two actions of tort, one against the keeper of a livery stable and the other against a street railway company, for personal injuries received by the plaintiff, while being driven in a cab of one defendant, because of a collision between the cab and a street car of the other defendant, where the plaintiff's due care was not in controversy and the driver of the cab and the motorman of the car, called as witnesses by the plaintiff, each gave testimony on which it could have been found that the collision was caused by negligence of the other, and there was no other evidence as to the cause of the collision, it was *held*, that the questions, whether negligence of either or of both of the defendants caused the injury, should be submitted to the jury.

TWO ACTIONS OF TORT for personal injuries received by the plaintiff when a cab, in which she was a passenger and which was owned by the defendant in the first case and was driven by his employee, came into collision with a street car of the defendant

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in the second action. Writs dated respectively December 1, 1909, and March 11, 1910.

In the Superior Court the cases were tried together before *Wait*, J. The plaintiff testified in her own behalf and called as witnesses the driver of the cab and the motorman of the street car. The substance of their testimony is stated in the opinion. There was no other evidence as to the cause of the accident. At the close of the evidence the judge ordered verdicts for the defendants; and the plaintiff alleged exceptions.

F. M. J. Sheenan, for the plaintiff.

J. E. Hannigan, for the Boston Elevated Railway Company.

DeCourcy, J. The plaintiff called as witnesses the driver of the cab and the motorman of the car; and each attempted to place upon the other the responsibility for the collision. Upon the motorman's testimony the jury could find that the cab driver, who had been going along the right side of Washington Street, suddenly turned and drove straight across the street railway tracks in front of an approaching electric car that was only eight feet away. This entitled the plaintiff to go to the jury in her action against the defendant Duggan.

The cab driver testified that he looked back before driving upon the track and saw the car about three hundred feet distant; and that the car was fifteen feet away when the front wheels of the cab were crossing the farther rail. The motorman said he could and did bring his car to a stop in from five to eight feet, by reversing the power. This evidence made the question of the railway company's negligence one of fact.

It was the function of the jury to decide upon the truth of this conflicting testimony and to determine whether the collision was due to the negligence of the motorman, or of the cab driver, or of both.

The plaintiff's due care was not in controversy. She was entitled to go to the jury against both defendants on the claim that their negligent acts, operating concurrently, contributed to her injury. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. In each case the entry must be

Exceptions sustained.

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SARAH I. LAXTON *vs.* LILLA O. HAY.

Suffolk. March 7, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Amendment of writ, Conduct of trial.

It is within the discretionary power of a presiding judge to allow after a verdict an amendment increasing the *ad damnum* of the writ.

After the charge to the jury in an action by one woman against another for the enticing away of the plaintiff's husband and the alienation of his affections, the presiding judge, in the course of a colloquy with counsel and in the presence of the jury, stated in substance that it was competent for the jury to return a verdict for damages beyond the *ad damnum* of the writ, and that he understood the plaintiff's counsel to suggest that, if the amount of damages returned should exceed the *ad damnum* of the writ, the plaintiff would move to amend, which could be done after the verdict as well as before, whereupon the plaintiff's counsel stated that he should desire to make such an amendment. *Held,* that the language of the judge was not beyond his power and did not tend to prejudice the defendant.

TORT for the wrongful enticing away of the plaintiff's husband and the alienation of his affections. Writ dated July 23, 1906.

In the Superior Court the case was tried before *Fessenden,* J. The *ad damnum* named in the writ was $10,000. At the close of the charge to the jury, the plaintiff's counsel in the presence of the jury asked the judge if he cared "to say anything to the jury with reference to the writ not going out." The judge replied, "It is entirely for them to say what the damage will be." The defendant's counsel then asked the judge, "Do I understand it is entirely competent for them to fix the damages even beyond the *ad damnum* of the writ?" to which the judge replied, subject to an exception by the defendant, "Yes." The judge then stated further, "I understand [the plaintiff's counsel] to suggest that in case it should be in excess of the *ad damnum* of the writ he should move to amend. If the damages should be in excess of the writ I understand your position to be you would want to amend. It can be done afterwards as well as before. If you do not desire to I will limit them." The plaintiff's counsel then stated, "I do desire to amend." The defendant alleged an exception to the authorizing

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of the jury "to bring in a verdict beyond the *ad damnum* of the writ."

The jury returned a verdict for the plaintiff in the sum of $15,000, after which the plaintiff moved to amend her writ by increasing the *ad damnum*, and the motion was allowed subject to an exception by the defendant.

S. K. Hamilton, T. Eaton & G. M. Stearns, for the defendant, submitted a brief.

F. J. Geogan, (*W. A. Morse* with him,) for the plaintiff.

RUGG, C. J. This is an action of tort to recover damages for the alienation of the affections of the plaintiff's husband by the defendant. At the close of the charge there was a colloquy between the judge and counsel the substance of which was that the plaintiff's counsel desired to have the cause go to the jury with the understanding that if a verdict was returned in excess of the *ad damnum* of the writ he should ask leave to amend the writ. This course was satisfactory to the presiding judge.

It is legally possible to amend in this regard at any time before judgment. R. L. c. 173, § 48. The allowance of such an amendment, even after verdict, rests in the judicial discretion of the court. *Ellis* v. *Ridgway*, 1 Allen, 501. *Luddington* v. *Goodnow*, 168 Mass. 223.

There was nothing in the language of the judge beyond his power or tending to prejudice the defendant.

Exceptions overruled.

MARIA C. SANTORA *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

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Middlesex. March 8, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Railroad, Trespasser, Of child. *Reckless or Wilful Misconduct.*

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train of the defendant while he was a trespasser upon the defendant's track, neither his age, his due care, due care on the part of his parents, or negligence or gross negligence on the

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part of employees of the defendant is an issue, and the plaintiff can recover only upon showing that his injuries resulted from wilful or wanton misconduct on the part of the defendant or of its employees.

Where, at the trial of an action against a railroad corporation by a child twenty-seven months of age who, while a trespasser upon a track of the defendant, was run over by a locomotive engine running backward and drawing four loaded freight cars, the plaintiff's evidence tends to show only that it was one of the duties of the engineer to keep a lookout along the track in the direction in which he was going, that the plaintiff might have been seen by the engineer when six hundred feet distant and that a whistle was sounded at that distance at a point where there was a post directing that it should be sounded, while evidence of the defendant tends to show that the engineer did not see the plaintiff until he was one hundred feet from him and then did all in his power to prevent the accident, a verdict should be ordered for the defendant, there being no evidence of reckless or wilful misconduct on the part of any of the defendant's employees.

TORT for personal injuries received by the plaintiff, a child twenty-seven months old, while she was trespassing upon the railroad track of the defendant near Valley Street in Marlborough, by being run over by a locomotive engine which was running backward drawing four loaded freight cars. Writ dated September 19, 1908.

In the Superior Court the case was tried before *King*, J. The declaration contained three counts, but it was submitted to the jury only upon the first count, which alleged as the cause of the accident careless, reckless and wanton conduct on the part of the defendant's employees.

There was evidence of the plaintiff tending to show that it was a duty of the engineer to keep a lookout on the track in the direction in which the train was going, that the plaintiff could have been seen by the engineer from the locomotive at a point more than six hundred feet distant from the place where she was struck, that at that point the train was running at a moderate rate of speed, that at about that point there was a post directing a whistle to be sounded and that the whistle was sounded and the bell was rung there.

Evidence of the defendant tended to show that the engineer first saw the plaintiff when he was one hundred feet from her and that he gave every warning possible and did all he could to stop the train before she was run over.

At the close of the evidence the defendant asked for a ruling that on all the evidence the plaintiff could not recover on the

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first count. The ruling was refused. The jury found for the plaintiff in the sum of $800; and the defendant alleged exceptions.

J. L. Hall, (*E. S. Kochersperger* with him,) for the defendant.

J. J. Shaughnessy, (*F. P. O'Donnell* with him,) for the plaintiff.

SHELDON, J. The plaintiff was a trespasser upon the defendant's track. She went upon it without any invitation or inducement, or even any license or permission, from the defendant. Accordingly the only legal duty which the defendant owed to her was to abstain from doing her any wilful or wanton injury. For mere negligence, even for gross negligence, no matter how great the injury it might cause to her, she could have no redress against the defendant. *Khinoveck* v. *Boston & Maine Railroad*, 210 Mass. 170. It is not a question of the due care of the plaintiff or of her parents, and her rights are no greater than if she were of full age.

We find no evidence that there was any such reckless, wanton or wilful conduct on the part of the defendant's servants as to warrant a verdict in her favor. The failure of the engineer to see her earlier than he did might have tended to show negligence on his part; the fact that the engine was running backward at the rate of speed which was claimed, the time and manner in which warning signals were given, and the failure to stop the train before she was hit, might have been material upon the issue of negligence, or of the degree of such negligence. But taking all the evidence and all possible inferences therefrom in the most favorable light for her, there is nothing to show wilful misconduct or any injurious act done with wanton or reckless disregard of the probable harmful consequences to her. *Willis* v. *Boston & Northern Street Railway*, 208 Mass. 589. The case last cited was stronger for the plaintiff than the one now presented, and yet it was held that the defendant was entitled to a verdict. There is nothing in *Yancey* v. *Boston Elevated Railway*, 205 Mass. 162, inconsistent with this.

The case comes within the provisions of St. 1909, c. 236, and the defendant is entitled to a judgment in its favor.

So ordered.

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MARTIN HEANEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 11, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability.

At the trial of an action against a street railway company by an employee for personal injuries due to being struck by a passing car while he was working between tracks of the defendant, the plaintiff testified that general instructions had been given to all employees similarly employed to look out for themselves, and also that a superintendent of the defendant had told him to go ahead with the work and he would look out for the cars. There also was evidence that, while the plaintiff was at work, the superintendent shouted a warning to him of the approach of the car which struck him, but that the warning came too late for him to avoid injury. *Held*, that the questions, whether the plaintiff when injured was in the exercise of due care and whether the superintendent was negligent, were for the jury.

RUGG, C. J. This is an action of tort to recover damages for personal injury sustained by the plaintiff through the negligence of the defendant's superintendent.* The plaintiff was a laborer, and for several months had worked for the defendant at picking, shovelling, and tamping ties. On the summer afternoon when the accident occurred, he was helping to put in some new work on a street in which the defendant had two tracks. One of these tracks only was in use, and he was working between the two in such a position that he was likely to be injured by any passing car if he did not get out of the way. He testified that general instructions to all men similarly employed had been to look out for themselves. But he also testified that one Crowley, who might have been found to be a superintendent of the defendant within the meaning of the employers' liability act, had said on the afternoon of the accident, after the plaintiff had stood up to look for the cars, "Go ahead with your work" and "we'll look out for the car." There was also this question, referring to the superintendent: "So he told you both things; told you to look out for yourself to a certain extent, and also told you that he would look

* The case was tried in the Superior Court before *White*, J. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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out for you, too?" to which the plaintiff answered, "Yes." While the plaintiff was bending over to his work he heard Crowley, who was very near, call out in warning of an approaching car, but in an instant, before he was able to escape from danger, he was struck and injured.

The governing rules of law are plain. Workmen upon or near tracks where there are passing cars, if it is a part of their duty to look out for themselves, have no right to abandon the use of their eyes or other senses and rely upon an occasional cautionary signal of a superintendent. *Lynch* v. *Boston & Albany Railroad*, 159 Mass. 536. If, however, the employee is given to understand, either by express language or by a custom, that he may depend upon being warned, then he may relax the vigilance which otherwise he would be required to exercise. The questions, whether the plaintiff, by reason of the nearness of the superintendent and his recent admonition to the plaintiff to keep at work and that others would look out for the car, was in the exercise of due care, and whether the superintendent in failing to give timely alarm of the approach of the car was negligent, were both facts to be determined by the jury under the circumstances here disclosed. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. *Hanley* v. *Boston Elevated Railway*, 201 Mass. 55. *Dunphy* v. *Boston Elevated Railway*, 192 Mass. 415.

Exceptions overruled.

W. Kittredge, for the defendant.

J. F. Creed, (*J. J. Mansfield* with him,) for the plaintiff.

ROSE M. MERRILL *vs.* INHABITANTS OF REVERE.

Essex. March 11, 12, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Saugus. Revere. Water Rates.

Under the provisions of St. 1904, c. 457, § 1, that the town of Revere might supply with water itself and its inhabitants and such inhabitants of the town of Saugus as then were supplied or might thereafter "make application to be supplied with

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water under the provisions of" St. 1889, c. 382, § 7, and that it might "regulate the use of such water and fix and collect rates to be paid for the use of the same," the town of Revere was given full and unqualified power to fix the rates to be paid for water furnished to inhabitants of Saugus and was not bound by the provision of St. 1889, c. 382, § 7, to the effect that the Revere Water Company, incorporated by that statute, if it supplied water to inhabitants of Saugus, must not charge rates in excess of those paid in the city of Lynn.

CONTRACT for money paid to the defendant by the plaintiff under protest for water furnished to the plaintiff's house in Saugus, the plaintiff contending that the rate charged her was in excess of the rate charged in the city of Lynn, which, she alleged, was the rate which she should have been charged. Writ dated January 5, 1910.

In the Superior Court the case was tried before *Bell*, J., who, after receiving answers to special questions submitted to the jury, which now are not material, ordered a verdict for the plaintiff for $87.05, and at the request of the defendant reported the case for determination by this court.

Other facts are stated in the opinion.

S. R. Cutler, for the defendant.

R. W. Reeve, for the plaintiff.

RUGG, C. J. The plaintiff seeks to recover money paid for water furnished by the defendant for her house in Saugus. She has established her right to recover except upon the single point whether the defendant was bound to provide her with water at the same rate charged by the city of Lynn. The decision of this question involves the interpretation of several statutes.

In 1887 the town of Saugus and the city of Lynn entered into a contract by which the city agreed to furnish water to the persons within the town at the rates established for water takers in the city. These rates for houses like that of the plaintiff have remained unchanged. The Revere Water Company was incorporated by St. 1889, c. 382, section 7 of which provided that it might furnish water to the inhabitants of Saugus for domestic and other purposes, upon application made through its board of selectmen, for which equitable compensation should be paid not to "exceed the rates now paid by said Saugus under its present contract with the city of Lynn." At a town meeting of Saugus in 1892, upon a sufficient article in the warrant it was voted that "the Revere Water Company is granted permission to supply water to such in-

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habitants as live on the line of their water main . . . with the right of charging said takers a tariff not exceeding the water rates paid to the city of Lynn. . . ." Thereafter upon proper application the Revere Water Company supplied the plaintiff with water. The town of Revere acquired the property, rights and privileges of the Revere Water Company (with exceptions not here material) pursuant to St. 1904, c. 457, section 1 of that act providing that "The town of Revere may supply itself, its inhabitants and such inhabitants of the town of Saugus as are now supplied with water or may hereafter make application to be supplied with water under the provisions of section seven of chapter three hundred and eighty-two of the acts of the year eighteen hundred and eighty-nine, with water for the extinguishment of fires and for domestic and other purposes, . . . and may regulate the use of such water and fix and collect rates to be paid for the use of the same." In 1906 and in succeeding years the town of Revere charged to the plaintiff a rate in excess of that charged by the city of Lynn. Did it have a right to do so?

It is not necessary to determine whether the Revere Water Company began and continued its supply of water to the plaintiff precisely in accordance with the terms of its charter and the general law, for the reason that § 1 of St. 1904, c. 457, recognizes the status of certain inhabitants of Saugus as takers of water, and it confers upon the defendant the right to supply other inhabitants of Saugus who make application to be supplied under § 7 of St. 1889, c. 382. This is not susceptible of a perfectly simple interpretation. But the more reasonable construction seems to be that reference is made to the earlier act only for the method of making application and not for determining the price. The significant words of § 1 of the later act are the concluding ones, which clothe the defendant with power to "regulate the use of such water and fix and collect rates to be paid for the use of the same." It is plain that the right "to regulate the use of such water" must refer to the water used in Saugus as well as to that used in Revere. "Such water" and "the same" water can refer grammatically and legally only to the last antecedent, which is that which it is authorized to supply both to its own inhabitants and to the inhabitants of Saugus. The jurisdiction to fix rates as described in this section is general, unqualified and absolute, and not re-

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stricted to the inhabitants of Revere. This language does not manifest a legislative intent to make an exception to the general power to fix rates by continuing the rates provided by the earlier statute for the existing water takers in Saugus and for those who may hereafter become takers in that town. Additional words would be needed to express such an intent. A reason for this may be found in the circumstance that the necessity for protection to the users in Saugus, when supplied by a private water company organized for profit and with no public supervision of its charges, against excessive rates as compared with those of Lynn, vanishes when the property is taken over by a town whose rates are restricted by law.

This conclusion is confirmed by other considerations. The defendant by St. 1904, c. 457, was to take water from the metropolitan water supply, and the prices to be charged for water so supplied became a matter of general interest. By § 10 of the same act the rents for the use of water must be such as to produce not more than a fixed maximum there set forth. This has a tendency to indicate uniformity among takers of the same class and not a difference based only on geographical conditions. St. 1907, c. 524, is entitled "An Act to prevent waste of water in cities and towns supplied from the sources or works of the Metropolitan Water District." Section 1 requires all cities, towns or districts supplied in whole or in part from the metropolitan water sources to equip with water meters all new services thereafter installed, and a percentage of its old ones each year; and to "charge each consumer in proportion to the amount of water used." The exception which the plaintiff seeks to establish touching users of water in Saugus, based on reference to § 7 of St. 1889, c. 382, cannot stand against these inclusive, clear, general provisions enacted for the preservation of water from waste and for uniformity in its use and sale, and the unequivocal grant to the defendant of power to fix rates for all takers of water.

Judgment for the defendant.

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ELLEN J. SAVAGE *vs.* JOSEPH P. COLLINS.

Suffolk. March 12, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions.

An exception by a defendant in an action of contract to a refusal by the judge presiding at the trial of the action to rule that on all the evidence the plaintiff was not entitled to recover will not be sustained if the bill of exceptions does not purport to contain the substance of all of the evidence at the trial material to the ruling, although from such evidence as it does contain it may appear that the ruling should have been given.

DECOURCY, J. This was an action for an alleged breach of a warranty in the sale of a piano. The defendant agreed that if the instrument should prove defective in material or workmanship within the time covered by the warranty he would put it in good repair or replace it with another of the same quality. He excepted to the refusal of the trial judge * to rule that the plaintiff was not entitled to recover; and in his bill of exceptions sets out testimony which tends to show that he did offer to replace the plaintiff's piano with another of the same quality and that the plaintiff would not accept it because the defendant refused to give her a warranty with the second piano. If this were all the evidence the ruling doubtless would have been given, as it appears that the judge "ruled that the defendant was not obliged to give the plaintiff an additional guaranty with a piano given to replace the piano sold." But the exceptions do not purport to contain all the evidence; and it is apparent that the record presents to us only a fragment of the case upon which the court was asked to rule. The defendant fails to show that he was aggrieved by the refusal of the court to rule as requested.

Exceptions overruled.

The case was submitted on briefs.

E. P. Benjamin, for the defendant.

A. J. Connell, for the plaintiff.

* *Bell,* J.

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SARAH F. CASTOR *vs.* ANNIE F. SMITH & others.

Norfolk. March 12, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Deed. Boundary. Words, "Beach."

Two of the boundaries in a deed of land by an arm of the sea were, "southerly by the upper edge of the beach, southeasterly by land of the grantor, there measuring about twelve feet as the fence now stands." The deed also stated, "No part of the beach is hereby conveyed." Fifteen feet back from the mean high water mark a grass grown bank from six to fifteen feet high rose abruptly at an angle of about forty-five degrees from a smooth sandy beach. Heavy spring tides rose to the foot of the bank. The fence mentioned in the deed came to the edge of the bank and no farther. *Held*, that there was nothing in the circumstances to give to the word "beach" any other than its ordinary meaning, that is, the space between ordinary high and low water mark; and therefore that the land between the bank and mean high water passed by the deed.

PETITION, filed in the Land Court on December 1, 1908, for the registration of the title of land of the petitioner on Town River Bay in Quincy.

In the Land Court the case was heard by *Davis*, J. It appeared that in 1861 one Andrews owned a tract of land including both that of the petitioner and that of the respondents; that he conveyed a small triangular piece from the westerly side thereof to the predecessor in title of the respondents, the description of the boundaries in the deed reading as follows: "Westerly by meadow of the town of Quincy, southerly by the upper edge of the beach, southeasterly by land of the grantor, there measuring about twelve feet as the fence now stands, and northeasterly by the highway to a stake. No part of the beach is hereby conveyed."

It further appeared that the petitioner was vested with title to all the land lying between the southerly line of the respondents' lot as thus defined and low water mark. "A grass grown bank which rises at an angle of about forty-five degrees extends along all the southerly side of the respondents' lot. This bank is about six feet high at the southeasterly corner of the respondents' lot, and gradually rises to a height of about fifteen feet at the southwesterly corner. The foot of the bank forms a sharp angle with the

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surface below, which is almost level and extends at a slight decline to low water mark. The bank is covered with grass down to the foot thereof, at which point the grass stops sharply and beyond which there is no vegetation. The soil from that point to low water mark consists of sand, and presents a surface substantially smooth and uniform. At mean high water the tide rises to a point about fifteen feet from the foot of the bank; the regular monthly high tides rise to within seven or eight feet of that point; the heavy spring tides rise to the foot of the bank. The fence referred to in the deed from Andrews above described extended from the line of the highway to the foot of the bank. There has never been any permanent fence or other permanent structure or barrier below the foot of the bank at any point in the area in dispute or separating it from the land retained by Andrews and now owned by the petitioner."

The petitioner sought to have registered a title to the beach extending to the foot of the grass grown bank above described. The judge of the Land Court ruled that she was entitled only to so much of the beach as lay below mean high water mark; and the petitioner alleged exceptions.

The case was submitted on briefs.

R. G. Dodge, for the petitioner.

G. H. Tinkham & S. E. Duffin, for the respondents.

DECOURCY, J. The only question involved in the petitioner's requests and in the ruling of the court is, what is the boundary line between the respondents' lot on the south and the adjoining land of the petitioner?

In its usual signification "the beach," in grants of lands bounded upon tidal waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows. Unless terms occur in the deed indicating a different intent, a conveyance of land describing the beach as its boundary does not include the beach, but extends to the line of mean high water mark. *Niles* v. *Patch*, 13 Gray, 254, 257. *Haskell* v. *Friend*, 196 Mass. 198. Any doubt as to whether the original owner Andrews intended his conveyance to extend to the sea side of the beach, that is to low water mark, was removed by making the southerly boundary line the "upper edge of the beach," and by expressly providing that "no part of the beach is hereby conveyed."

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On the other hand the shore above high water mark was included in the deeds through which the respondents acquire their title. The fact that this upland is covered by the heavy spring tides does not make it a part of the beach within the fixed and definite meaning of that word in the deeds. If the respondents' predecessor in title intended to make the grass grown bank the southerly bound of the land conveyed, presumably he would have so stated in the deed.

Exceptions overruled.

ROBERT N. BURNS *vs.* ALLEN C. JONES. 213 - 434

Middlesex. March 15, 1912. — April 1, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Damages, Mental distress and injured feelings. *Evidence,* Materiality. *Practice, Civil,* Exceptions.

At the trial of an action for an assault and battery, although it appears that no third person was present when the assault was committed, testimony by the plaintiff, that he felt humiliated on account of the assault and did not sleep at all the night following it, is admissible to show the extent of mental distress and injured feelings resulting from the assault, for which he is entitled to reasonable compensation.

At the trial of an action against the proprietor of a hotel for an assault and battery committed upon the plaintiff by a porter in the defendant's employ, it appeared that the plaintiff had stated to the porter, who was polishing the plaintiff's shoes in the toilet room of the hotel, that he desired to change his stockings and that the porter had replied, "You can't change your stockings here." Thereafter the plaintiff retired to a closet and, while he was changing his stockings there, the porter, in an attempt to enforce a regulation of the hotel, committed the assault. It appeared that a regulation of the hotel forbade the changing of clothing in any part of the toilet room, but that no notice of the regulation was given to the plaintiff other than the porter's statement. In redirect examination of the plaintiff he was allowed, subject to an exception by the defendant, to state that he did not understand the porter's statement to mean that he could not change his stockings inside the closet. *Held,* that, even assuming that it was error to admit the testimony of the plaintiff as to what he understood to be the meaning of the porter's statement, such testimony at most was immaterial and its admission did not prejudice the defendant.

TORT for an assault and battery alleged to have been committed by a porter of the defendant, the proprietor of the New American House in Boston. Writ dated June 10, 1909.

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In the Superior Court the case was tried before *King*, J. There was evidence tending to show that the plaintiff went to the defendant's hotel, intending to get dinner there; that he first went to the toilet room to have his shoes polished; that, having a new pair of stockings with him, he told the porter that he would like to change his stockings, and that the porter replied that he could not change them there; that the plaintiff then entered one of the toilet closets and began to change his stockings, whereupon the porter forcibly ejected him. No third person saw the assault committed. Other facts are stated in the opinion.

There was a verdict for the plaintiff for $500; and the defendant alleged exceptions.

H. H. Bond, for the defendant.

F. P. Garland, for the plaintiff.

DeCourcy, J. This was an action of tort for an assault committed upon the plaintiff by a servant of the defendant. The only exceptions relate to the admission of evidence.

1. The plaintiff's testimony that he felt humiliated in consequence of the assault and did not sleep any all night was rightly admitted. The insult and indignity inflicted upon him may well have occasioned distress of mind and injury to his feelings more serious than the physical damage, and the plaintiff was entitled to recover reasonable compensation therefor. *Smith* v. *Holcomb*, 99 Mass. 552. *Meagher* v. *Driscoll*, 99 Mass. 281. *Lopes* v. *Connolly*, 210 Mass. 487.

2. The defendant introduced testimony of a regulation of the hotel that no clothing should be changed in any part of the toilet room; but there was no evidence that the plaintiff knew of its existence. In redirect examination the plaintiff was allowed to testify that when he was having his shoes polished and the porter said to him, "You can't change your stockings here," he did not understand that the porter was forbidding him to change them inside the toilet room. It does not appear for what purpose this testimony was admitted. Probably the trial judge inferred that the defendant intended to argue in mitigation of damages that the plaintiff provoked the assault by wilfully violating a regulation of the hotel; and deemed it competent for the plaintiff to show that to his mind the somewhat ambiguous notice prohibited the use for the purpose intended of only the public portion of the toilet room.

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But even assuming that this testimony was incompetent, it was at most immaterial and did not affect the merits of the action. A harmless error of this character, that does not appear to have injuriously affected the substantial rights of the parties, furnishes no ground for the reversal of a verdict that was warranted after a full and fair trial. *Wilson* v. *Fall River Daily Herald Publishing Co.* 143 Mass. 581. *Scaplen* v. *Blanchard*, 187 Mass. 73. 1 Wigmore on Evidence, § 21.

Exceptions overruled.

MARGARET E. FLYNN *vs.* JEREMIAH P. O'RIORDAN.

Suffolk. March 18, 1912. — April 1, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway.

If a pair of horses, attached to a dray or caravan, while being used in the business of their owner are left wholly unhitched and unattended standing in a city street near the sidewalk, and if for some unknown reason they swerve and injure a person who is walking along the middle of the sidewalk, in an action against the owner for such injuries these facts are evidence of negligence.

TORT for personal injuries from being struck by one of a pair of horses belonging to the defendant, which were left unattended attached to a dray or caravan standing near the sidewalk of Water Street in Boston. Writ dated January 15, 1910.

In the Superior Court the case was tried before *Brown*, J. "It was agreed that at the time of the accident the horses and team belonged to and were engaged in the business of the defendant transporting United States mail." The time of the accident and the way in which it happened are stated in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant, and reported the case for determination by this court. If his ordering of the verdict was correct, judgment was to be entered for the defendant; otherwise, the case was to be sent back to the Superior Court for trial.

The case was submitted on briefs.

J. F. McDonald & J. M. Graham, for the plaintiff.

R. Spring, for the defendant.

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DECOURCY, J. The plaintiff's due care is not questioned. Upon the issue of the defendant's negligence the following facts were in evidence. At about 5.30 P. M., on December 2, 1908, the defendant's two horses attached to a mail wagon were left unattended at the side of the post office building on Water Street in Boston. They were not hitched to any post, nor secured by any weight or otherwise; and no driver appeared upon the scene until about five minutes after the accident. As the plaintiff was walking along the middle of the sidewalk the horses swerved from where they were standing on the street and the plaintiff was struck by one of them and thrown against the building. This evidence entitled the plaintiff to go to the jury. *Southworth* v. *Old Colony & Newport Railway*, 105 Mass. 342. *Carey* v. *Milford & Uxbridge Street Railway*, 193 Mass. 161.

New trial ordered.

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MARY F. LYONS & another *vs.* DELIA E. ELSTON.

Suffolk. March 19, 1912. — April 1, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Equity Jurisdiction, To set aside deed procured by undue influence, Plaintiff's clean hands. *Undue Influence. Equity Pleading and Practice*, Master's report, Appeal. *Words*, "Affected."

In a suit in equity by a brother and sister against their sister, to set aside a deed of real estate made by the mother of all the parties to the defendant alone, a master found that the defendant and the plaintiff sister "connived together to induce their mother to make a will in their favor to the exclusion of" the plaintiff brother, that the mother "was unduly influenced by them," and that, although of her own volition she suggested a deed instead of a will, she "was nevertheless affected" by such undue influence when she executed the deed. *Held*, that this was a finding that the execution of the deed was procured by undue influence, and that such a finding could be made in spite of the fact that the instrument adopted by the subservient mind of the mother was not the one in the dominating minds of the daughters.

Where the master to whom a suit in equity was referred was a trained lawyer of large experience, no longer living, the language of his report, when reasonably susceptible of such interpretation, should be construed so as to accomplish the end of deciding the point at issue before him.

In a suit in equity to set aside a deed of real estate made by the mother of the parties to the suit and alleged to have been procured by the undue influence of

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her two daughters, the fact, that the daughters were excluded from the room during the conference between the attorney and the mother when directions for making the deed were given, is not inconsistent with a finding that the deed was procured by the undue influence of the daughters. Nor is the fact that the mother was "in full possession of all her mental faculties" inconsistent with such a finding, especially where it also is found that she was "easily influenced by such one of her children as happened to be in closest contact with her."

In a suit in equity by a brother and sister against their sister, to set aside a deed of real estate made by the mother of all the parties to the defendant alone, it was found by a master that the execution of the deed was procured by the undue influence of the defendant and the plaintiff sister for the purpose of excluding the plaintiff brother, that at the time of the execution of the deed the plaintiff sister acquiesced, believing that her interests were guarded, but that after the mother's death the defendant asserted her sole title to the property and thereupon the plaintiff sister joined with her brother in bringing the suit to set aside the deed. *Held*, that, although the plaintiff brother was entitled to a decree, the plaintiff sister did not come into court with clean hands and could not have the aid of a court of equity to relieve her from the harmful consequences of a wrong in which she participated.

Upon an appeal by the plaintiff in a suit in equity from a final decree dismissing the bill, it is open to the defendant to contend that upon the facts shown by the master's report the plaintiff is not entitled to prevail, and a defense is none the less open to the defendant because he did not appeal from an order in the final decree overruling an exception by him to the master's report based on the same defense.

BILL IN EQUITY, filed in the Superior Court on December 6, 1908, by Mary F. Lyons and Thomas F. Kelley, children of Honora Kelley, who died on November 24, 1908, to set aside a deed of certain real estate in Somerville made on September 24, 1908, by Honora Kelley to the defendant, a sister of the plaintiffs, alleged to have been procured by the undue influence of the defendant; with a prayer for further relief.

The case was referred to Stephen H. Tyng, Esquire, as master. The findings contained in his report are stated and described in the opinion. The defendant filed five exceptions, referred to in the opinion, of which the fifth was not argued and the first four were as follows:

"1. Because the master finds that prior to the making of the deed in question the deceased was unduly influenced by Delia and Mary, the respondent and one of the petitioners, 'to make a will in their favor' and that in suggesting and making the deed instead she was 'affected at said time by said undue influences.'

"2. Because, upon the facts and circumstances stated there is no evidence in the case to warrant a finding that the deceased was

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unduly influenced in the suggesting and execution of the deed in question, and the master should have so found.

"3. Because upon the facts and circumstances stated the master should have found affirmatively that the deceased was not only 'in full possession of all her mental faculties' but also that in the making of said deed she was not affected by any undue influence.

"4. Because, upon the facts and circumstances stated if it be true that the deceased was unduly influenced by said Delia and Mary in the making of said deed, and that said Mary 'acquiesced therein,' as the master finds, and that said Mary accepted and retained and still retains the benefits to her under the two bills of sale made by the deceased at the time of making the deed and as a part of the same transaction, then the master should also have found that said Mary F. Lyons is estopped to deny, and cannot be heard as a party in this case as to, the validity of said deed."

The case was heard upon the defendant's exceptions to the master's report by *Hardy*, J., who made an order sustaining the defendant's first, second and third exceptions and overruling her fourth and fifth exceptions. Later the judge made a final decree, repeating the order in regard to the defendant's exceptions and ordering that the bill be dismissed. Both of the plaintiffs appealed.

W. R. Bigelow & E. J. Flynn, for the plaintiffs.

J. A. McGeough, for the defendant.

RUGG, C. J. This is a suit in equity, in which two children of Honora Kelley, now deceased, seek to set aside her deed of real estate to the defendant, the other of her children. The master finds that the defendant and her sister, the female plaintiff, "connived together to induce their mother to make a will in their favor to the exclusion of Thomas [her son] and her grandson, and that she was unduly influenced by them, and that although she of her own volition, and with the idea of preventing trouble which might be occasioned if she left another will, suggested a deed instead, was nevertheless affected at said time by said undue influence." This finding, although not so plain as it might have been made, yet is not difficult of understanding. The mother had made at least two wills before the making of the deed. The daughters "connived together" to induce the mother to dispose of her property for their benefit, to the exclusion of their brother

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and nephew. This was their end and purpose. The will was the instrumentality by which this design was to be accomplished according to their view. But the mother, although unduly influenced by them to execute their wish, yet suggested to her attorney a different way of bringing about the result to which she had been unduly influenced, by making a deed instead of a will. The finding that the mother "was unduly influenced" by her daughters can have no meaning except by reference to the deed, for she made no will at this time or later. The words "at said time" mean when the deed was executed, while a repetition of the thought of domination by the daughters is expressed by the words "affected . . . by said undue influence." "Affected" in this connection signifies acted upon, moved or changed, which are well recognized definitions and natural uses of the word. This finding indicates both the intent on the part of the daughters to exercise mastery over the mind of the mother and a yielding on her part to the power thus put forth. The master's report was made by a trained lawyer of large experience, now deceased, and his language should be construed to accomplish the end of deciding the point in issue before him, when reasonably susceptible of such interpretation, rather than to defeat the purpose of the hearing. The fact that the instrument adopted by the generally subservient mind of the mother was not the one in the minds of the daughters is of slight consequence. Their bottom purpose was the exclusion of their brother and nephew from any share in the property of their mother. The means for executing that purpose is not a primary but a wholly incidental consideration, which does not modify the main finding of the exercise of undue influence.

There are no subsidiary findings in the master's report inconsistent with the final conclusion. That the daughters were excluded from the room during the conference between the attorney and the mother when directions for making the deed were given, is not of prevailing signification. Their overruling influence might have dominated the mother's mind even in their physical absence. Nor is the fact that she was "in full possession of all her mental faculties" decisive. It also was found that she was "easily influenced by such one of her children as happened to be in closest contact with her." These two facts are not inconsistent. Although weakness of mind is often a condition for the exer-

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cise of improper influence, the full possession of one's faculties does not necessarily render one immune to such influence. There may be absent that strength of character required to resist the overpowering will of another. It ought to be added that the conduct of the attorney was above criticism.

The deed was made to the defendant alone. This was known to the plaintiff Mary F. Lyons at the time it was executed, and she acquiesced, believing that her interests were being sufficiently guarded. Since the death of the mother, the defendant has asserted sole title to the property. Hence the sister Mary now joins with her brother in this proceeding to set aside the deed. It is a principle of equity that those who seek its relief must come into court with hands clean touching the transaction under inquiry. This female plaintiff, however, joined "with the defendant in the exercise of the undue influence" which caused the making of the deed. Therefore, she cannot have the aid of a court of equity to relieve her from the harmful consequences of a wrong in which she participated.

It is urged by the plaintiff Lyons that this point is not now open to the defendant, because her exception to the master's report based on this ground was overruled, and she did not appeal. In the Superior Court a decree was entered dismissing the bill, and both plaintiffs appealed. On such an appeal it was open to the defendant to argue from the facts found in the master's report that the plaintiffs or either of them were not entitled to prevail. That is the ground upon which this question is decided. That ground under these circumstances is open none the less because also made the subject of an exception, which, standing alone, could not be availed of now by the defendant. But it is open under the appeal of the plaintiffs. *French* v. *Peters*, 177 Mass. 568. *Huntress* v. *Hanley*, 195 Mass. 236, 239. *Sunter* v. *Sunter*, 204 Mass. 448, 454. *Nelson* v. *Winchell & Co.* 203 Mass. 75, 93. *Lipsky* v. *Heller*, 199 Mass. 310, 313.

It follows that the defendant's first, second and third exceptions to the master's report should have been overruled, and her fourth exception sustained. The fifth exception has not been argued, and is treated as waived. The decree should be reversed, and a new decree be entered ordering the defendant to convey to the plaintiff Thomas F. Kelley such proportion of the property con-

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veyed to her by the deed of her mother as he would be entitled to as an heir at law if the mother had died intestate seised of it, and the bill should be dismissed without costs as to the plaintiff Mary F. Lyons.

Decree reversed; new decree in accordance with this opinion.

RUPERT W. ROBINSON *vs.* SPRINGFIELD STREET RAILWAY COMPANY.

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217 - 165

Hampden. September 26, 1911. — May 20, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & LORING, JJ.

Negligence, Street railway, Motor cycle, In use of highway. *Evidence*, Competency, Opinion: experts. *Witness.*

At the trial of an action against a street railway company for personal injuries received when the plaintiff, while riding a motor cycle, was run into by a street car of the defendant, there was evidence tending to show that tracks of the defendant's street railway were in the middle of a street forty or fifty feet wide which the plaintiff was approaching from an intersecting street intending to turn to the left thereon, that the plaintiff's view of the street to his right was obscured by a building, that just before he entered from the intersecting street, he listened and looked to see whether a car was coming and shut off his power so that he was going about six miles an hour, that as soon as he could see the street to his right, he noticed a car about forty feet distant coming from that direction at the rate of twenty miles an hour, that no gong had been sounded on the car, that, seeing that he could not continue safely across the defendant's tracks, the plaintiff sought to turn sharply to his left, propelling the cycle by foot power, and to get between the car and the left hand curb of the street, and that before he could do so he was struck by the part of the car just back of the vestibule. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the accident was due to negligence for which the defendant was liable, were for the jury.

At the trial of an action for injuries caused by a collision of a street car with a motor cycle which the plaintiff was riding, after the plaintiff had been recalled by the defendant and had been submitted to further cross-examination following a long cross-examination as to details, he was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Held*, that the question was permissible, because, properly interpreted, it called for further facts and not for the plaintiff's opinion.

TORT for personal injuries caused by the plaintiff, while he was riding a motor cycle, being run into by a street car of the defendant. Writ dated May 23, 1910.

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In the Superior Court the case was tried before *Sanderson*, J. The facts are stated in the opinion. The jury found for the plaintiff in the sum of $346; and the defendant alleged exceptions.

The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

J. B. Carroll, W. H. McClintock & J. F. Jennings, for the plaintiff.

LORING, J. The evidence warranted the jury in finding the following to be the facts in this case: The plaintiff going east on a motor cycle came down Lebanon Street in the city of Springfield and turned into Hancock Street intending to go north on that street. Hancock Street is forty to fifty feet wide, with an electric car track in the middle of it. As the plaintiff "came along up Lebanon Street" he listened and looked to see if a car was coming, and shut off the power "right at the corner," and was then going six miles an hour. There is a house on the southwest corner of Lebanon and Hancock Streets which obstructed the plaintiff's view of a car coming from the south (as the car here in question was coming) up Hancock Street. The gong of the car was not sounded. As soon as the plaintiff got into a position where he could see down Hancock Street to the south, he saw the car here in question coming at the rate of twenty miles an hour; it was then about forty feet away. Realizing that he could not cross to the right hand side of Hancock Street ahead of the car, the plaintiff turned his cycle and "pedalled" to get between the car and the left side line of Hancock Street. He testified that he "went within probably a foot or such a matter of the car track before I turned my machine." But before he succeeded in getting clear and when he was about fifteen feet north of the cross walk on Hancock Street opposite the north line of Lebanon Street, the car struck him "right in the shoulder, the shoulder and side," "caught the machine and threw me [him] on the ground." The part of the car which struck him was just back of the vestibule, where the side of the car "swells" out. The motorman of the car testified that he never saw the plaintiff until he backed his car after the accident to the place where the plaintiff then was. Under these circumstances there is no question of the defendant's negligence.

1. The circumstances of the case so far as the plaintiff's con-

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tributory negligence is concerned are substantially the same as those in *Robbins* v. *Dartmouth & Westport Street Railway*, 203 Mass. 546, with two exceptions: In that case the car was or could have been found to be going forty in place of twenty miles an hour and the motor cycle was going four in place of six miles an hour. In both cases, when the plaintiff turned the corner and the car was seen, it was too near to admit of the plaintiff's going in front of it, and the jury could find that each plaintiff (who took the same course of action) did what a reasonably prudent man would have done under the circumstances. Further, in our opinion it could not be ruled as matter of law that the plaintiff was negligent in allowing himself to get into the place of danger in which he found himself. The case at bar is stronger than *Robbins* v. *Dartmouth & Westport Street Railway* in that although the plaintiff there testified that he heard nothing as he approached the corner he did not testify that he listened (as the plaintiff did in the case at bar) before he came to the corner. For other cases which support the conclusion reached in this case see *Hatch* v. *Boston & Northern Street Railway*, 205 Mass. 410; *LeBaron* v. *Old Colony Street Railway*, 197 Mass. 289; *Green* v. *Haverhill & Amesbury Street Railway*, 193 Mass. 428; *Halloran* v. *Worcester Consolidated Street Railway*, 192 Mass. 104; *Williamson* v. *Old Colony Street Railway*, 191 Mass. 144. We have examined all the cases cited by the defendant; they are all of them distinguishable from the case at bar on grounds which are apparent and therefore need not be specifically pointed out.

2. After a long cross-examination as to details, the plaintiff was recalled by the defendant. At the end of this further cross-examination his counsel was allowed to put this question to him: "Was there anything, Mr. Robinson, you could have done that you didn't do to have avoided this collision?" To this the defendant took an exception.

The defendant's counsel has assumed in his argument that this question called for the plaintiff's opinion upon the issue whether he did all that could have been done to avoid the collision. If that had been the true meaning of the question it would have been incompetent. Of that there is no doubt. *Short Mountain Coal Co.* v. *Hardy*, 114 Mass. 197. *Providence Tool Co.* v. *United States Manuf. Co.* 120 Mass. 35. *Spillane* v. *Fitchburg*, 177 Mass. 87.

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Whipple v. *Rich*, 180 Mass. 477. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511. On the other hand it is equally free from doubt that it would have been competent for his counsel to have asked the plaintiff whether he recalled any further fact bearing upon the question of his having done all that could have been done to avoid the collision.

The question asked and allowed did not in terms ask for the plaintiff's opinion on the one hand nor on the other hand did it in terms ask if there were further facts bearing on this matter. The question was so framed that its true character is not perfectly clear. But we are of opinion that it must be taken to have called for further facts and not for the plaintiff's opinion. Its framework is not unlike that of the question allowed where the mental condition of a person is in issue. In such a case it is settled that a witness who saw the person can be asked what, if anything, he saw which indicated that the person was of unsound mind. This question is allowed because, properly construed, it seeks to get facts which bear upon the unsoundness of the mind of the person in question, and does not seek to get the witness's opinion upon the significance of what he saw. See *Clark* v. *Clark*, 168 Mass. 523; *Hogan* v. *Roche*, 179 Mass. 510; *McCoy* v. *Jordan*, 184 Mass. 575; *Gorham* v. *Moor*, 197 Mass. 522.

Exceptions overruled.

HENRY Q. MILLETT, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 13, 1911. — May 20, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Passenger. Negligence, Railroad, Causing death.

At the trial of an action against a railroad corporation under R. L. c. 111, § 267, for the death of the plaintiff's intestate, it appeared that the intestate, who owned and had in his possession a mileage book of the defendant, with the intention of travelling wholly on the defendant's lines to a point beyond a junction point took a train to the junction point, the conductor taking from the mileage book his fare to that point only; that the car in which he had arrived at the junction was left standing on the second track from the station platform

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and the train on which he intended to complete his journey was due to arrive immediately on the other side of the platform; that without objection on the part of the defendant he remained in the car in momentary expectation of the other train instead of crossing the intervening track and going to the station platform; that, when the train arrived, he left the car to cross the platform to the train, when he was struck and killed by an engine which had been detached from the train on which he had arrived and, at a speed of from eight to ten miles an hour, was being backed down the intervening track without any warning signals being given. *Held*, that the evidence warranted findings that the plaintiff's intestate was a passenger of the defendant when killed, and that his death was due to negligence of the defendant.

MORTON, J. This is an action of tort to recover for the death of the plaintiff's intestate while a passenger on the defendant's railroad. The action is brought under R. L. c. 111, § 267, and the declaration is in two counts. The first count alleges negligence on the part of the defendant and the second the unfitness or gross negligence of its servants or agents. At the close of the evidence the presiding judge * directed a verdict for the defendant and reported the case: "If the plaintiff should have been permitted to go to the jury a new trial to be ordered, otherwise judgment to be entered for the defendant."

The questions are whether the deceased was a passenger at the time of the accident, and whether, if so, there was evidence of negligence on the part of the defendant.

The plaintiff does not contend that there was any evidence warranting a finding that the accident was caused by the unfitness or gross negligence of the defendant's servants or agents. The question of due care on the part of the deceased is not involved. *Commonwealth* v. *Boston & Lowell Railroad*, 134 Mass. 211.

The accident occurred March 14, 1906. The deceased was a travelling salesman and lived in Sharon. He left his home on the morning of the day of the accident to go to Fall River in the course of his business, expecting, as there was evidence tending to show, to return between 6 and 6.30 P. M. He transacted his business in Fall River and took a train for Sharon which left Fall River at 5.04 P. M. The train went no farther than Mansfield, and was due there at 5.45 P. M. At Mansfield he had to change and take a train on the Providence division on the other side of the station. He had in his pocket mileage books of the defendant

* *Dana, J.*

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company, and from one of these the conductor detached coupons which covered his fare from Fall River to Mansfield. The books were equally available from Mansfield to Sharon. The train that left Fall River arrived at Mansfield on time. The engine was uncoupled from the train, leaving the car in which the deceased was standing on the track opposite to the station. The track on which the car stood was the north bound track. Between that and the station was the south bound track which passengers had to cross to reach the station and take trains on the Providence division. The train from Providence was due at Mansfield within a minute or two after the arrival of the train from Fall River. On the afternoon of the accident it was between four and five minutes late. The evidence would warrant a finding that the deceased remained in the car in momentary expectation of the arrival of the train from Providence, and on its arrival left the car for the purpose of taking the train to Sharon. As he stepped down on to the south bound track he was struck by the engine of the train that had brought him to Mansfield, which was backing down, and was instantly killed.

We think that there was evidence warranting a finding that the deceased was a passenger at the time of the accident. He was on his way from Fall River to his home in Sharon. The mileage books in his possession operated as a prepayment of his fare when the necessary coupons were detached. He had not arrived at his destination. The station at Mansfield was an intermediate station where he was to connect with the train that would take him to Sharon. So far as appears no notice or warning was given to him to leave the car, and the car itself was left standing opposite to the station where the train stopped when it arrived at Mansfield. It could have been found that he remained in the car without any objection from the defendant's servants or agents, in momentary expectation of the arrival of the connecting train, with the intention of proceeding by that train in continuation of the journey which he had begun until he arrived at his destination. Assuming that the same rule in regard to leaving the train applies to a passenger over connecting lines operated by the same company, when he arrives at the intermediate station where the connection is to be made, that applies to a passenger arriving at his destination, the question is ordinarily one of fact for the jury

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under suitable instructions, whether, in leaving the train when and as he did at the intermediate station to take the connecting train, the passenger was, taking all the circumstances into account, within his rights as such passenger or had ceased for the time being to be a passenger. We see nothing in the case before us to take it out of the rule thus stated. In *Heinlein* v. *Boston & Providence Railroad*, 147 Mass. 136, there was no dispute as to the facts or the inferences to be drawn from them and the relation of the plaintiff to the defendant as an intending passenger had ceased.

We also think that there was evidence of negligence on the part of the defendant. There was evidence tending to show that without any warning being given or whistle blown or bell rung, the engine was backed down at a speed of eight to ten miles an hour over a track which it was known passengers would have to cross to get to the station. This would justify a finding of negligence on the part of the defendant.

In accordance with the terms of the report there will be a new trial.

So ordered.

C. W. Bond, (*J. J. Hughes & H. E. Perkins* with him,) for the plaintiff.

J. L. Hall, for the defendant.

PATRICK J. McNULTY *vs.* FRANK E. CRUFF.

Suffolk. January 8, 1912. — May 20, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Novation. Contract. Statute of Frauds.

At the trial of an action by a subcontractor against the owner of a building to recover for work done by the plaintiff under a contract originally made by the plaintiff with a general contractor, there was evidence tending to show that, because of a failure by the general contractor to pay the plaintiff in accordance with his agreement with him, the plaintiff ceased work, that after the work had ceased for some days, there was a conversation between the defendant and the plaintiff in the presence of the general contractor in which the defendant

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showed to the plaintiff some work not described in the contract which he wanted done, saying "I don't want to pay you one cent for it, but I want you to finish up the balance of your contract and I will pay you your money at any time, either before or after the work is done." Thereafter the plaintiff did the extra work described and completed the contract. *Held*, that there was evidence that for a good consideration the defendant had agreed to assume the obligation of the general contractor to the plaintiff and that the plaintiff had accepted the substitution of the defendant for the general contractor as his debtor; and that the defendant's promise was not within the statute of frauds.

CONTRACT for $325.35 and interest, $250 of which was alleged to be a balance due to the plaintiff on a contract for the performance for a general contractor named Hazard of the excavating and masonry work on houses on Dunreath Street in that part of Boston called Roxbury belonging to the defendant, it being further alleged that the defendant, at a time when the work was not completed by the plaintiff, had agreed, in consideration of the plaintiff's performing other work for him without charge, to pay for the balance of the work to be done under the contract with Hazard. The remaining $75.35 claimed in the declaration was for items admitted by the defendant to be due to the plaintiff. Writ in the Municipal Court of the West Roxbury District of the City of Boston dated February 9, 1910.

The answer, as to the claim for $250, set up the statute of frauds.

On appeal to the Superior Court the case was tried before *Quinn*, J. The plaintiff testified that, because of a failure by Hazard to make a payment of $200, he took his men off the job and they remained away for from eight to ten days; that then the defendant called him upon the telephone on August 10, 1909, "and said 'Mac, what is the trouble down there? Why don't you go down there and finish your work?' I said, 'I will do no more work until I get what is due me and this thing is straightened out.' He said, 'Put your men down there in the morning. . . . I can't finish my work until this work is finished. I will be there and we will straighten this matter right there.' I said, 'Well, if that is so, I will be there with my men in the morning, and I want you to be sure.' He said 'I will.' I went down with four men in the morning and stood on the sidewalk. Mr. Cruff came along in a few minutes. 'Now Mac,' said Mr. Cruff, 'I want that bit of a buttress built there, 'side of the stairs, and I don't want to pay you one cent for it, but I want you to finish up

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the balance of your contract and I will pay you your money at any time, either before or after the work is done.' Mr. Cruff and Mr. Hazard were there all this time."

On August 14, the plaintiff received from Hazard a check of the defendant for $200 and gave to Hazard a receipt reading "Received of P. Hazard" $200 "account mason work Dunreath St." The plaintiff testified that Hazard had acted "as an errand boy" for him in getting the check from the defendant, and that he was looking to the defendant and not to Hazard for payment at that time.

The plaintiff built the buttress referred to above and completed the contract.

There was other evidence, some of it tending to corroborate and some to contradict the testimony of the plaintiff.

At the close of the evidence the judge ruled that the agreement of August 10 was within the statute of frauds and ordered a verdict for the plaintiff only for the admitted items of extras and interest, $82.67; and the plaintiff alleged exceptions.

F. G. Bauer, for the plaintiff.

P. G. Bolster, for the defendant.

HAMMOND, J. If, as the result of the conversation which took place on August 10 between the plaintiff and the defendant in the presence of Hazard, there was an understanding between the three that the defendant, in consideration of work to be done by the plaintiff, should pay the plaintiff what Hazard had agreed to pay him and the plaintiff accepted the defendant as his debtor in the place of Hazard, then the promise was not within the statute of frauds and the plaintiff, having done the work promised, may hold the defendant. *Trudeau* v. *Poutre*, 165 Mass. 81. *Paul* v. *Wilbur*, 189 Mass. 48, and cases cited.

The defendant, conceding this, strenuously insists that there is no evidence of such an understanding. On this the case is close. Considering however the conversation itself, the circumstances under which it was held and the evidence as to the subsequent conduct of the parties, we are constrained to say that, brief and meagre as is the evidence, the plaintiff had a right to go to the jury on the question whether such an understanding was reached.

Exceptions sustained.

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JOHN J. LANG *vs.* BOSTON ELEVATED RAILWAY COMPANY.

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Suffolk. January 8, 9, 1912. — May 20, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Street railway. *Evidence*, Materiality. *Practice, Civil*, Conduct of trial, Exceptions.

At the trial of an action against a street railway company for personal injuries alleged to have been received by the plaintiff by being run into by a street car of the defendant, evidence of the length of time that the motorman had been in the defendant's employ as a motorman and of the amount of instruction he had received is immaterial and inadmissible upon the questions of what the motorman did and whether what he did was negligent.

If a judge presiding at a trial admits evidence of the plaintiff which was improper for the jury to consider and in doing so makes to the jury a statement as to its significance which is incorrect, and later in his charge correctly states the law with regard to the significance of the evidence but does not withdraw the evidence from the jury nor expressly withdraw his incorrect statement made when it was admitted, and the jury find for the plaintiff, it cannot be known which statement of the judge the jury followed and therefore an error prejudicial to the defendant has been committed and an exception by him will be sustained.

TORT for personal injuries from being run into by a street car of the defendant on Devonshire Street in Boston, the declaration being in a single count and alleging as the cause of the injuries "negligence and carelessness of the defendant, its servants, agents or employees." Writ dated July 20, 1907.

In the Superior Court the case was tried before *King*, J. The defendant excepted to the admission of evidence as to the length of time of the employment of, and the extent of instructions given to the motorman in charge of the car which ran into the plaintiff, and to the admission of testimony of the plaintiff that he was in business as a photographer, that he had an "average income" for several years previous to the accident which amounted to from $50 to $75 or $100 per week and also that by reason of his injury he was unable to fulfil a contract with a committee of a high school graduating class for photographs.

The jury found for the plaintiff in the sum of $550; and the defendant alleged exceptions.

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F. M. Ives, for the defendant.

J. H. Baldwin, (*C. Toye* with him,) for the plaintiff.

HAMMOND, J. One of the questions was whether in the circumstances of the collision between the plaintiff and the defendant's car the motorman was negligent. That was to be determined by his acts either of commission or omission. Upon the questions what those acts were and whether they or any of them were negligent, the length of time he had been in the defendant's employ as a motorman and the nature and amount of his instructions were entirely immaterial and the evidence upon those matters was wrongly admitted. The defendant seasonably excepted to its admission. It is suggested by the plaintiff that putting an inexperienced or incompetent person in the position of a motorman might be of itself evidence of the defendant's negligence. But unless there was evidence of negligence in the conduct of the motorman the negligence of the defendant in employing him did not contribute to the accident and therefore was immaterial.

It is further argued by the plaintiff that the error, if any, was corrected by the words of the presiding judge to the jury. It appears that after the evidence had been admitted and during the further cross-examination of the motorman by the plaintiff, the presiding judge remarked to the jury upon the bearing of the evidence as follows: "The company was represented by the motorman, so far as the running of the car under the direction of the conductor. Now if the motorman was not careless, not lacking in due care, it is not of the slightest importance how many days had intervened since he had ceased receiving instructions from an inspector, or whatever may be the name of the official that accompanied him and gave him instructions, whether a day or a year. If he was not careless, it is certainly of no importance. But I have let the evidence in as to how long he had been there, and it may or may not throw a little light upon the question of whether or not he was in the exercise of due care. It may or may not. If it does not, that is the end of it. If he was careful it makes no difference. I only mention this to you so that you will understand the purport of the evidence as it proceeds." In his final charge at the close of the case he spoke upon this matter as follows: "If you find that the plaintiff was in the exercise of due care, then you come to the question of the motorman; and the discussion of his due care

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has been involved somewhat in that of the plaintiff. Was he managing that car as a prudent motorman should — reasonably prudent? . . . It is of no importance, I take it, whether he had been in the employ of the company one month or one year, or five years. The question is, did he act as a reasonably prudent man should, under the circumstances, no matter how long or how short his services?"

It will be observed that there was no express withdrawal of the remarks first made to the jury. If there was inconsistency in the two statements it cannot be known which statement the jury followed. We think that the original remarks were not sufficiently withdrawn either expressly or by fair implication.

The evidence was immaterial, and to one accustomed to trial by jury in this class of cases it is not difficult to see that it was calculated to be prejudicial to the defendant upon the question of the negligence of the motorman.

Whether the evidence as to damages was properly admitted in the way in which it was presented is not free from doubt, but in view of the result to which we have come upon the other part of the case we do not think it necessary to consider it.

Exceptions sustained.

FRED M. BURROUGHS, trustee, *vs.* GEORGE G. WELLINGTON & another.

SAME *vs.* SAME.

Norfolk. December 11, 1911. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, Bill for instructions. *Trust. Equity Pleading and Practice,* Withdrawal of bill for instructions. *Probate Court,* Appeal.

A petition in the Probate Court under R. L. c. 162, § 5, by a trustee for instructions regarding the trust, is a proceeding in equity and is governed by the rules of equity pleading and practice.

Where, after all parties interested have appeared and answered to a petition in the Probate Court by a trustee for instructions regarding the trust a hearing has been had and a decree is ready for signature but has not been entered, the trustee files a motion "to dismiss" or for leave to withdraw the petition, the judge

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within his discretion may deny the motion and an appeal from such action is without merit.

On an appeal to the Supreme Judicial Court from a decree of the Probate Court upon a petition by a trustee under R. L. c. 162, § 5, for instructions, the decree is not suspended nor are proceedings under it stayed and the case should not be dealt with as a proceeding brought originally in the Supreme Judicial Court, the only question before the Supreme Judicial Court being, whether the decree of the Probate Court was wrong for any of the reasons assigned as objections to the decree; and the decree to be entered by the single justice should determine that question only and should remand the case to the Probate Court for further proceedings.

PETITION IN EQUITY, filed in the Probate Court on July 29, 1909, by the trustee under the will of Jennie G. Greene, late of Milton, for instructions with regard to the disposition of certain specified money of the trust estate.

In the Probate Court the case was heard by *Flint*, J. After the hearing and pending the entry of a decree, the petitioner moved that the petition might be dismissed or that he might be permitted to withdraw it. The motion was denied; and the petitioner appealed.

The judge of the Probate Court thereafter made a decree that the "trustee account for said money in accordance with the terms of said trust." The petitioner appealed and stated as objections to the decree (1) that the Probate Court had no jurisdiction to make it, and (2) that certain statements in the petition were incorrect.

Both appeals were heard by *Rugg*, J., who made a decree affirming the decree of the Probate Court refusing to dismiss the petition or to allow it to be withdrawn.

An extended amendment of the petition was allowed by the single justice by consent of the respondents, and an answer to the amended petition and a replication were filed. After a hearing a detailed decree was made by the single justice; and the petitioner appealed.

E. M. Bennett, for the petitioner.

F. H. Noyes, for the respondents, was not called upon.

BRALEY, J. The appellant, who is the duly appointed trustee under the will of Jennie G. Greene, petitioned the Probate Court for instructions as to the construction of the fifteenth article, which created the trust, and whether certain funds received by him were within its terms. It appears that all persons interested were duly

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notified and when the adverse decree ordering him to account was ready for the signature of the judge, the petitioner moved to dismiss or to be allowed to withdraw the petition. The motion having been disallowed and the decree entered, he appealed to this court, and assigned as the reason of appeal, that "in the case of a petition for instructions by a trustee under a will, such trustee is entitled as of right before a decree has been made thereon, to have such petition dismissed upon his petition therefor."

A trustee who desires instructions as to the administration of the trust should proceed by a bill in equity in the regular form, if suit is begun in this court, or in the Superior Court. *Gibbins* v. *Shepard*, 125 Mass. 541. *Swasey* v. *Jaques*, 144 Mass. 135. R. L. c. 159, §§ 1, 10. But if he resorts to the Probate Court under R. L. c. 162, § 5, while he must proceed by petition, the proceedings are still in equity, and are governed by our rules of equity practice and procedure. *Greene* v. *Gaskill*, 175 Mass. 265. *Sibley* v. *Maxwell*, 203 Mass. 94, 106, 107. The petition being in the nature of a bill of interpleader to enable the trustee to obtain instructions as to the disposition of the money, the appellees and beneficiaries who claimed it as belonging to the trust were alone entitled to be heard. *Houghton* v. *Kendall*, 7 Allen, 72, 73. Having brought them before the court he had no further interest in the suit, except to execute the trust as directed by the court. If he then could discontinue as of right, the estate would have been exposed to needless expense and future litigation, as his conduct seems plainly to indicate that the questions raised would have to be settled by judicial determination. It consequently was within the discretion of the judge to decide whether the petition should be dismissed or withdrawn, after the issues in which parties other than the petitioner were interested had been tried and determined and the decree denying the motion must be affirmed. *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 171 Mass. 450. *New York, New Haven, & Hartford Railroad, petitioner*, 182 Mass. 439. *Jackson* v. *Ensign*, 199 Mass. 116. *Weston* v. *Railroad Commissioners*, 205 Mass. 94, 97.

The second appeal, which is from the decree directing the petitioner to account in accordance with the terms of the trust is also without merit. By the allegations of his own petition, even as amended, he had received sums of money which he holds for

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the benefit of the appellees, who severally have attained the age when the legacies became payable. The bequests to each with any accumulations should be paid, and the trust terminated. The appeal, however, did not suspend the probate decree, or stay proceedings under it. R. L. c. 162, §§ 9, 16, 17. And it cannot be dealt with as if the case originally had been brought in this court, but the decree ordered must be enforced by the Probate Court whose jurisdiction remains notwithstanding the appeal. *Dunham* v. *Dunham*, 16 Gray, 577, 578. *Smith* v. *Smith*, 184 Mass. 394, 396. *Tyndale* v. *Stanwood*, 186 Mass. 59, 61. The only questions brought up having been whether the probate decree was wrong for any of the objections assigned as reasons of appeal, the decree entered by the single justice should be modified by directing the case to be remanded to that court for further proceedings, and when so modified it is affirmed with double costs to be paid by the appellant. *Cooney* v. *Whitaker*, 192 Mass. 596, 599.

Ordered in each case accordingly.

HELEN P. FOSTER *vs.* ABIGAIL P. SMITH & others. 213 - 93

Middlesex. December 12, 13, 1911. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Devise and Legacy. Power. Way, Private. *Easement,* Creation by exception.

A testator devised a parcel of land to his three children, two sons and a daughter, as joint tenants with a remainder in fee to such of their children as should be living at the time of the death of his last surviving child, subject to a power in his children to convey "his, her or their interest in and to said real estate . . . to either one or more of the children of any of them," which conveyance so made should "vest in the grantee thereof a full and perfect title in fee simple, notwithstanding the above devise to [the testator's] children as joint tenants." The two sons died without exercising this power. After their death the daughter made a deed of the land under the power to one of her three children. Children of both of the sons were living. *Held*, that the power exercised by the daughter applied to the whole parcel of land of which she had become the life tenant and that her child in whose favor she exercised the power took a title in fee simple to the whole of the land.

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A provision in a deed of land for a right of way for the benefit of "the owners and their assigns" of an adjoining lot of land of the grantor, if the right of way is over a pathway referred to in the deed as an existing way, may operate as an exception and create an easement in fee without the use of the word "heirs."

PETITION, filed in the Land Court on October 21, 1910, and amended on January 11, 1911, for the registration of title to a parcel of land in Lincoln, being the first parcel mentioned in the second clause of the will of Jonas Smith, late of Lincoln, so much of the petition as related to the second parcel there mentioned having been stricken out by the amendment.

In the Land Court the case was heard by *Davis*, J. Jonas Smith was the petitioner's grandfather. He died in 1875, and his will, which was dated in 1862, was proved. The petitioner claimed title to the parcel in fee simple under that will and under a deed to her from her mother, Sarah Caroline Pierce, dated March 4, 1910, purporting to be made in execution of a power contained in the will.

The second clause of the will was as follows:

"2d. I give, bequeath and devise to my three children Francis Smith, Webster Smith and Caroline Pierce wife of Samuel H. Pierce, the certain tract of land with the buildings thereon, containing seven acres more or less, being the same upon which my new house and barn now is, and situated in said Lincoln about one half mile from the centre thereof, on the road from said Lincoln to Concord. Also a certain other parcel of land, being woodland, situated in said Lincoln between the above mentioned lot and the Depot road, and adjoining the Beaver Gray Meadow, containing two acres more or less. — to hold to the said Francis, Webster and Caroline as joint tenants, for and during their joint lives and the survivor of them; and upon the decease of the survivor of them, (no conveyance thereof having been made according to the power hereinafter set forth), said estate to be equally divided among the children of said Francis, Webster and Caroline, who shall at that time be living, their heirs and assigns forever. —

"Giving however to either of my said children full power to convey his, her or their interest in said Real estate to my other children or either of them and such conveyance so made, shall vest in the child or children to whom it is made an estate for life, and upon the decease of the grantee or grantees thereof, the share

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or shares so conveyed shall be equally divided among & between the children of said grantee or grantees share and share alike, and shall vest in them an estate in fee simple —

"And in default of issue of said grantee or grantees then to the heirs of said grantee or grantees, their heirs and assigns forever.

"And further giving to my said children or to either of them full liberty and power, to convey his, her or their interest in and to said Real estate or any part thereof to either one or more of the children of any of them, and such conveyance so made shall vest in the grantee thereof a full and perfect title in fee simple, notwithstanding the above devise to my children as joint tenants."

Jonas Smith at his death left the three children named in his will. Webster and Francis died, and Sarah Caroline Pierce was the sole survivor at the time that she gave the deed to the petitioner, who was one of her three children. At the time of the hearing seven grandchildren of Jonas Smith were living, of whom three were children of Francis Smith and one was the child of Webster Smith. Each of the children of Francis and Webster claimed a remainder in fee in the parcel in question, in common with the other grandchildren, contingent upon surviving Sarah Caroline Pierce. They asked the judge to rule in accordance with this claim, and he refused to do so. He ruled that, by the will of Jonas Smith, Sarah Caroline Pierce took a power to convey, and by her deed did convey, the parcel in fee simple to her daughter, the petitioner.

The petitioner claimed a right of way appurtenant to the land in controversy over adjoining land, which belonged to the respondent Abigail P. Smith by devise from her late husband Francis Smith. Both parcels formerly belonged to Jonas Smith, who conveyed the parcel comprising the adjoining land to his son Francis Smith by a deed dated April 1, 1850, the parcel containing one hundred acres described as beginning at the corner "on the path leading to Lilly Ditch then running south on east side of pathway on my land to Lilly Ditch," and so on, followed by these words: "Reserving however to the owners and their assigns of the lot of seven acres on which a new house and barn now stands the right to pass and repass said Lilly Ditch pathway at such times and for such purposes as they shall desire." The petitioner relied upon this clause for her claim of the right of way. The "lot of seven acres on

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which a new house and barn now stands" was the parcel sought to be registered. There was no evidence regarding this pathway excepting the above language in the deed of Jonas Smith. The respondent Abigail P. Smith asked the judge to rule that Jonas Smith reserved a right of way for his life only. The judge refused to make this ruling.

The judge ordered a decree for the petitioner; and the respondents alleged exceptions.

G. M. Palmer & J. S. Smith, for the respondents.

J. L. Thorndike, for the petitioner.

HAMMOND, J. By the second paragraph of the will of Jonas Smith two parcels of land were devised. The petition as finally amended concerns only the first parcel. It is contended by the respondents that the habendum clause of the paragraph does not affect this parcel, but only the second. This position is untenable. The description of each parcel is included between the granting or devising clause and the habendum clause, and it is manifest that the latter clause refers to all covered by the first. Such is the only reasonable interpretation.

Irrespective of the powers, the will creates as to this real estate a joint tenancy for life in the three children of the testator with a remainder in fee to such of their children as shall be living at the time of the death of his last surviving child. But both these estates, that for life as well as that in remainder, are subject to modification by the exercise of the powers conferred upon the life tenants. There are two powers given to each life tenant, — one to convey his interest to the other life tenants or either of them, and one to convey his interest to either one or more of the children of any of them. In case of a conveyance under the first power the estate granted is vested in the grantees or grantee for life and the remainder in fee in their children, share and share alike, or in default thereof to their heirs. This power never was exercised and, as only one of the life tenants is now living, never can be exercised. It is to be considered only so far as it throws light upon the meaning of the second power. In the case of a conveyance under the second power there was vested in the grantee a "full and perfect title in fee simple, notwithstanding the above devise to my children as joint tenants."

It is evident from the will itself that the draughtsman was well

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acquainted with the rules of law as to real estate and as to powers. The general plan for the disposition of the land was simple in outline. There was a joint tenancy for life in the three children of the testator with remainder in fee to certain of his grandchildren. The life estate was vested, the remainder was contingent going only to those who should be living at the time of the death of the last life tenant. If the testator had stopped here, then in the absence of any conveyance by the life tenants or either of them, the joint tenancy would have continued under the right of survivorship in the survivors for the time being until the death of the last survivor, when the contingent remainder would have become vested. If either joint tenant had conveyed his interest, then as to that interest the joint tenancy would have ceased and his grantee would have held as tenant in common with the others. As to this part the right of survivorship would be gone. But a conveyance by one of three joint tenants of his interest does not affect the joint tenancy of the other two as to their interests. As between these two the right of survivorship still remains as to their interests. The relation between them and the grantee of the other is that of tenants in common, while that between themselves is that of joint tenants as to their interest, with the right of course in each of them to sever by conveyance the joint tenancy still remaining between them. Co. Lit. § 294. 2 Bl. Com. 186. But while the joint tenants could have dealt at will with the life estate, they in the absence of the powers given in the will could not have dealt with or affected in any way the remainder. Such would have been the situation in the absence of any special powers.

We are now brought to the consideration of the nature and effect of the second power. By the death of Francis and Webster, two of the life tenants, the whole life estate became vested in Caroline, the sole survivor. She proceeded to act under the second power and made a conveyance of her interest in the land to her daughter, who is the petitioner. The deed recites the power, and there is no doubt that the deed conveyed all that the grantor, either in her individual capacity or as donee of the power, could convey, and that the grantee received by virtue of the deed and of the power all that she could receive.

The power was given "to my said children or to either of them . . . to convey his, her or their interest . . . to either one or more of

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the children of any of them," and "such conveyance so made shall vest in the grantee thereof a full and perfect title in fee simple, notwithstanding the above devise to my children as joint tenants." The power is to convey the interest of the life tenant. What was the interest of Caroline, the life tenant? While all were living she was one of three and could have conveyed a life estate in an undivided third of the land. While only two were living she was one of two and could have conveyed a life estate in only an undivided half of the land. When she became the sole survivor she could have conveyed the life estate in the whole land. And this she could have done as an incident to the joint tenancy. If, acting under her common law rights as a joint tenant and not under the power contained in the will, she had made a conveyance of her interest to a stranger, which she certainly could have done, the grantee would have taken what her interest was at the time of the conveyance, either a life estate in the whole land or in an undivided half or third, as the case might be.

But it is argued by the respondents that, whatever might have been her powers at common law and whatever might have been the legal effect of a conveyance thereunder, this deed was in pursuance of the power and in exercise thereof, and that by the language of that power the interest which was to be affected and to which under the power the title in fee simple was to attach was not her interest in the life estate at the time of the conveyance, but her original interest, namely, one third.

But this interpretation does not commend itself to us. The most natural interpretation is to consider that the interest she had the power to convey was the interest which she had at the time of the conveyance.

By virtue of the deed the whole life estate passed to the grantee and by virtue of the power there was vested in the grantee a full and complete title to the land, the life estate in which was conveyed by the deed. The grantee became seised of the fee in the land. Upon this branch of the case we concur with the following language of the judge of the Land Court: "It seems to me that the intention of the testator as to the land in question was first, to keep it in the family, and second, subject only to that limitation, to leave it within the control of his three children. Each could dispose of his own life interest and each could dispose of

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the remainder thereunder as he saw fit within the limits of the family. I find no intention, except only on failure to exercise any of the powers, to preserve the estate in thirds or in shares to be held *per stirpes*. On the contrary the powers of disposition given to each child expressly provided for either a severance or a consolidation of both the estates for life and of the remainders thereunder. The testator's intention seems to me manifest that the property should eventually vest in such grandchild or grandchildren as his own children might select for the purpose. These respondents could have been selected either by their own parent or by their uncle or aunt. By not exercising the powers given him each child as he died left not only his life estate, but the power of disposition over the remainder, to the survivors and then to the last survivor. . . . It seems to me that it was the intent of the testator that the title thus vesting in fee simple should be the title to the entire estate and that he used words not only apt, but technically exact, for that purpose. I rule that under the will of Jonas Smith and the deed from [Sarah] Caroline Pierce the petitioner acquired a title in fee simple to the whole of the land now in controversy."

The ruling was right. The ruling as to the right of way was also right. In the deed from Jonas Smith to Francis Smith of the land adjoining the land in controversy it was mentioned as the "path leading to Lilly Ditch," that is, as an existing way. The provision for a right of way over the path may take effect as an exception. *Hamlin* v. *New York & New England Railroad*, 160 Mass. 459. *Bailey* v. *Agawam National Bank*, 190 Mass. 20, and cases cited.

Exceptions overruled.

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VICTOR JOHNSON vs. OTIS ELEVATOR COMPANY.

Middlesex. January 9, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability. *Practice, Civil*, Verdict.

A contractor, who is putting elevators in a building and has not undertaken to construct the stagings to be used by his workmen but only to furnish suitable materials out of which the workmen may construct stagings for themselves, is not liable at common law for injuries to one of his workmen from falling down an elevator well by reason of the tipping up of a temporary movable staging on which the workman was standing, if the accident was due to the careless adjustment or improper construction of the temporary staging which was made and adjusted by the fellow employees of the workman.

In an action for personal injuries by a workman against his employer, in which the plaintiff was allowed to go to the jury on a count at common law and on a count under the employers' liability act alleging negligence of a superintendent, the jury returned a general verdict for the plaintiff in the sum of $8,000. It was argued for the plaintiff, that, even if there was no liability at common law, the plaintiff might be allowed to retain this verdict to the amount of $4,000. It having been decided by this court that there was no evidence warranting the submission of the case to the jury on the common law count but that there was evidence to be submitted to the jury on the count under the statute, it was *held*, that from the amount of the damages it was manifest that the verdict of the jury was based on the count at common law, and that accordingly it could not stand and there must be a new trial on the count under the statute.

TORT for personal injuries sustained on February 5, 1909, while the plaintiff was in the employ of the defendant engaged in assisting in work upon an elevator well in a building then in process of construction on Washington Street in Boston, from the tipping up of a staging on which the plaintiff was working. Writ dated March 15, 1909.

In the Superior Court the case was tried before *King*, J. The facts which could have been found upon the evidence are stated in the opinion. It was admitted by the defendant that one McDonald, mentioned in the opinion, was a superintendent within the meaning of the employers' liability act, and that notice of the time, place and cause of the injury was given in accordance with the provisions of that act.

The judge refused to rule that on all the evidence the plaintiff

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could not recover. The declaration as amended contained five counts, of which the first was at common law, alleging negligence in failing to keep the staging in a safe or proper condition, and the third was under the employers' liability act, alleging negligence of a superintendent or of a person acting as superintendent. The fourth and fifth counts were waived and the judge ruled that the plaintiff could not recover on the second count, which was for a defect in the ways, works or machinery of the defendant. He left the case to the jury upon the first and third counts, except so much of the third count as related to the negligence of a person acting as superintendent in the absence of the superintendent. The jury returned a verdict for the plaintiff in the sum of $8,000; and the defendant alleged exceptions.

In regard to the defendant's liability on the third count it was argued for the plaintiff before this court, that, even if the defendant was not liable at common law, the plaintiff might be allowed to retain his verdict under Rule 40 of the Superior Court up to the amount of $4,000. See R. L. c. 106, § 74 (St. 1909, c. 514, § 131).

J. Lowell & J. A. Lowell, for the defendant.

R. G. Dodge, (*F. W. Johnson* with him,) for the plaintiff.

HAMMOND, J. While the plaintiff, as an employee of the defendant, was engaged in the construction of an elevator well in a building then in process of erection, the staging upon which he was standing tipped and he was precipitated from the eighth or ninth floor to the basement and seriously injured.

The staging, of the type commonly called "Jacob's Ladder," was suspended in the well and was moved vertically from floor to floor as occasion required. It consisted of two joists, hereinafter called foundation joists, running at an angle with the floors of about forty-five degrees and resting at their upper ends against the vertical wall forming the back of the well, and at their lower ends upon the beam which formed the edge of the floor in front of the well. Near the lower ends of these joists were fastened uprights which supported one end of a horizontal platform formed of ledger and other boards, the other end of the platform resting on the upper ends of the foundation joists. To prevent the stage from slipping on the floor a piece of board about a foot long and three or four inches wide was nailed to the side of each foundation joist near the foot, projecting below the joist four or five inches

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and forming what is called a "crow's foot." The stage was supported at one end by the back wall of the well, and at the other end by the impact of the "crow's feet" with the edge of the floor in front of the well. A rope was attached to the centre of the platform and was carried over a pulley at the top of the well, so that the stage could be raised or lowered. It is manifest that so long as the lower ends of the foundation joists were firmly kept from slipping the stage was held and could not tip, but that if by reason of any defect in the construction or placing of the crow's feet the foundation joists should slip over on to the floor, then the upper ends of the foundation joists no longer supported by the wall might fall and the stage tip. When the stage was in position, the platform upon which the men stood while using it was only a few feet from the level of the floor next above that against which the feet of the foundation joists were braced, and the platform was approached from this upper floor by the men.

The plaintiff testified that on the morning of the accident he and two fellow workmen went to work drilling holes in the rear wall of the well for the insertion of supports for some brackets which were to be placed there. He testified that he thought that at that time the stage was at the eleventh or "top" floor. After he had been at work about two hours and a half, during which time the stage had been lowered at least one story, suddenly, while he and one of his fellow servants were standing upon that part of the platform which was close to the rear wall, the platform tipped. As to the manner of the accident a fellow workman who was on the platform with the plaintiff testified: "All I know happened is that the staging slipped out on the floor, the [foundation] joists slid out, which tipped the platform so as to drop us all down." It appeared that immediately after the accident the wall ends of the foundation joists were found pointed downwards and the front ends were tipped up against the top of the elevator doorway which was situated at the floor where the feet had been fastened.

It was evident that the feet of the foundation joists had slid out on to the floor, but whether this was because the crow's feet were imperfectly constructed, or whether being properly constructed they were carelessly placed, did not appear. There was evidence that, commonly but not always, a cross bar longer than the width of the elevator doors is nailed across the feet of the foun-

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dation joists so that even if the joists should slip they could not slip far enough to lose their support by the rear wall. And the plaintiff contended that in view of the great danger to the men which was likely to happen from a slipping of the feet of these joists, due care required the adoption of this expedient. There is no doubt that upon the evidence the jury might properly find that the omission of the cross bar was negligence.

But even if it be assumed that due care required such a bar and further that the accident was due to its absence, there is still one fatal objection to the plaintiff's case so far as it rests upon the count at common law. There is no evidence that the defendant was answerable at common law. The general work upon this building in which the defendant was engaged was the construction of four elevators. It is plain upon the evidence that the defendant was not expected and did not undertake to construct the staging. It was to furnish the materials suitable for the purpose and the employees were to do the rest. There was no evidence of any want of suitable material, nor is there any claim that the defendant did not furnish lumber enough for the needed cross bar. This very stage was made by the fellow employees of the plaintiff one of whom, McKane, was on the stage at the time it slipped. It was a comparatively simple contrivance. The evidence did not warrant a finding that it was a completed appliance about which as such the defendant was answerable for due care. Whether the accident was due to an improper adjustment or construction of the crow's feet or to the lack of a cross bar, in either event the negligence was not that of the employer but of a fellow servant, for which at common law the defendant is not answerable to the plaintiff. And that is so whether or not the plaintiff himself actually helped to build the stage, or saw it before it was placed in position for use. So far as respects the count at common law the case must be classed with *Kelley* v. *Norcross*, 121 Mass. 508; *Colton* v. *Richards*, 123 Mass. 484; *Killea* v. *Faxon*, 125 Mass. 485; *Nichols* v. *Boston & Maine Railroad*, 206 Mass. 463, and similar cases.

But there was evidence to be submitted to the jury on the third count which was based upon the alleged negligence of McDonald. He ordered the plaintiff to go upon the staging, and the question whether it was a negligent order under the circumstances was for

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the jury. See *Arkerson* v. *Dennison*, 117 Mass. 407; *Feeney* v. *York Manuf. Co.* 189 Mass. 336, and cases cited.

From the amount of the damages named in the verdict it is manifest that the verdict of the jury is based upon the first count. That verdict cannot stand. The second of the defendant's requests * should have been given.

Exceptions sustained.

WILLIAM F. NEWMAN *vs.* ANNA B. NEWMAN.

Middlesex. January 11, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Marriage and Divorce. Judgment. Practice, Civil, Exceptions, Trial by judge without jury.

At the trial of a libel for divorce against a wife for a specified act of adultery it appeared that the husband had brought a previous libel for divorce which had been dismissed. The judge, against the exception of the libellee, "permitted evidence to be introduced as to matters testified to in the former case so far as the same might indicate an adulterous disposition on the part of the libellee." There was direct evidence ample to prove the act of adultery charged in the present libel and the record recited that the "court unaffected by the evidence excepted to, relative to the previous conduct of the libellee, found as a fact that the allegations of the libel were sustained." *Held*, that, without deciding whether the former judgment was a bar to the admission of the evidence, its admission was made immaterial by the subsequent action of the judge.

At the trial of a case before a judge without a jury the admission of incompetent evidence, which the judge states that he afterwards disregarded in his findings of fact, is not to be commended.

Where a libel by a husband for divorce, charging the libellee with one specified act of adultery, contains the allegation, usual in this Commonwealth, that the libellant always has been faithful to his marriage vows and obligations and the answer is a general denial without any specification under Divorce Rule 9 of the Superior Court of any substantive fact which the libellee intends to rely upon at the hearing, the libellee cannot be allowed to show that the libellant has been unfaithful to his marriage vows by misconduct which has no relation to the offense charged against the libellee. And *it seems*, that, even before the adoption of the rule of court in 1906, the better practice was in accordance with this conclusion.

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* This was a request for a ruling that the plaintiff could not recover on the first count.

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LIBEL FOR DIVORCE, filed July 12, 1910.

In the Superior Court the case was heard by *Quinn*, J., who ordered a decree nisi for the libellant. The libellee alleged exceptions, raising the two questions which are stated in the opinion.

The case was submitted on briefs.

J. H. Hurley, for the libellee.

H. L. Baker & F. K. Rice, for the libellant.

HAMMOND, J. Two questions are raised, both of evidence.

1. It appeared that the libellant had previously brought a libel for divorce against the present libellee, and the record showed that it had been dismissed. Nevertheless, at the hearing on this present libel, the presiding judge, against the exception of the libellee, "permitted evidence to be introduced as to matters testified to in the former case in so far as the same might indicate an adulterous disposition on the part of the libellee." It is urged by the libellee that by the former judgment, which was in her favor, the libellant was shut off from all further inquiry not only as to whether before the time covered by the previous libel she had committed adultery but also whether up to that time she had shown an adulterous disposition. We do not find it necessary to consider this contention because we think that the error, even if there was any, was corrected by the subsequent action of the judge, and that the libellee was not prejudiced by the admission of the evidence.

Only one act of adultery was specified in the libel, alleged to have occurred between six o'clock P. M., July 6, 1910, and seven o'clock A. M. of the next day upon the high seas, on a steamboat plying between Boston and Portland. The evidence was ample to prove the allegation. The record recites that the "court unaffected by the evidence excepted to, relative to the previous conduct of the libellee, found as a fact that the allegations of the libel were sustained." We understand this to be in effect a statement that in coming to a conclusion the judge entirely disregarded the evidence to which the libellee had objected, or in other words that he as judge had instructed himself as a finder of facts to disregard it, and obeying the instruction did disregard it. That being so, it does not appear that the libellee was harmed even if the evidence was wrongly admitted. This method of the trial of cases before a judge without a jury, however, is not to be commended any more than in a trial with a jury. In either case it is

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always desirable that the person who determines the facts, whether he be judge or juror, should hear only what the law says he may hear. It is hard to be sure of one's self after the evidence is introduced, even if one tries to disregard it. In the present case, however, the evidence as to the adultery charged was so direct and, if believed, so conclusive, that the evidence of any previous adulterous disposition may well have been regarded as of no consequence and wholly to be set aside, as well upon the question of the credibility of the witnesses as to the adultery charged, as upon the fact of its occurrence.

2. The libel recited, as is usual in this Commonwealth, that the libellant always had been faithful to his marriage vows and obligations. The answer was a general denial. Several questions were asked of both libellant and libellee with the intent to show that the former had not been faithful to his marriage vows and obligations. The judge ruled that any material misconduct or unfaithfulness on the part of the libellant "would have to be specially pleaded," and having so ruled excluded the questions, to all of which the libellee excepted.

It is to be premised that this exception in no way concerns the right of the judge as the representative of the interests of the public to make inquiries having a material bearing upon those interests, whatever may be the issues raised by the pleadings. This right cannot be affected by the pleadings of the parties. We are dealing only with the rights of the parties under the pleadings.

In support of her exception the libellee urges that, since the libel alleges the faithfulness of the libellant to his marriage vows and the answer denies all the allegations of the libel, the faithfulness of the libellant is necessarily one of the issues involved; and that in such a state of the pleadings any evidence of his violation of his marriage vows is admissible. To apply this to the present case, she insists that although the charge against her is one definitely specified act of adultery she is entitled to show that the libellant has been guilty of some act of adultery or other misconduct inconsistent with his marriage vows, although such act may have had no relation to the offense charged against her.

It seems that in the ecclesiastical courts of England it was not the practice to allege the "virtue of the libellant." The libel set out the marriage, the jurisdictional facts and the misconduct

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relied upon; and this was regarded as making out a *prima facie* case. And any misconduct of the libellant upon which the libellee relied to defeat the action was set up in the answer. Coote's Eccl. Pr. 320, 350. And such is the practice in England under St. 20 & 21 Vict. c. 85, under which actions for divorce were transferred from the ecclesiastical to the law courts. Dixon on Divorce (ed. of 1883), 554, and (ed. of 1908) 372. In the United States the practice varies according to the statutes of the respective States. See 2 Bish. Mar. & Div. §§ 596 *et seq.*, and the notes thereto, for a general statement of the practice. In some States the allegation of faithfulness seems necessary. *Epling* v. *Epling*, 1 Bush, 74. *White* v. *White*, 45 N. H. 121.

In this Commonwealth the general practice, beginning probably very early (see Oliver's Prec. (ed. of 1828) 561) and continuing down to the present time has been for the libellant to allege his faithfulness to his marriage vows and obligations. And there can be no doubt that quite generally, in the absence of any written answer the libellee has been allowed to introduce evidence bearing upon that allegation, even although the intention was to show misconduct having no relation whatever to the offense charged against the libellee. The better practice, however, is shown in *Pastoret* v. *Pastoret*, 6 Mass. 276. In that case, which was a libel for divorce *a vinculo* for the cause of adultery, the libellee pleaded that the several allegations contained in the libel were false, and prayed that the divorce might not be granted. The court said that under the pleadings they would not permit evidence to be given of adultery on the part of the libellant, but that the plea must allege the facts which the libellee intended to prove, in order that the libellant might have notice of the charge and prepare herself to repel it if in her power. Accordingly the libellee pleaded anew, alleging adultery on the part of the libellant. And such has been the usual practice in cases of recrimination where the act relied upon as a bar to the libel has no connection whatever with the offense charged therein, but relates to entirely independent misconduct. See *Cushman* v. *Cushman*, 194 Mass. 38, and cases cited.

But whatever might have been the practice before 1906, the rights of the parties in this respect seem to be defined and settled by the ninth divorce rule passed by the Superior Court in that year.

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It is as follows: "A libellee who appears to contest the libel, shall, before the hearing, file an answer stating fully and specifically what allegations in the libel he admits or denies and every substantive fact he intends to rely upon at the hearing." This rule fairly interpreted means at least that if the libellee relies upon any substantive fact as a bar to the libel, which fact is entirely independent of the offense charged against him, he must plead it. And that is so even if the libel sets up the faithfulness of the libellant and the answer denies it. The rule thus interpreted tends to give each party in this important and delicate subject of legal inquiry a chance to prepare to meet a charge of marital misconduct. Under the pleadings the evidence was properly excluded.

Exceptions overruled.

ANNIE BROGI, administratrix, *vs.* MARY E. BROGI.

Suffolk. January 11, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Insurance, Life. Husband and Wife.

Where in a policy of life insurance, issued by a company organized in another State, the person named as beneficiary is described as the wife of the insured, and it appears that at the time the policy was issued the insured and the person named as beneficiary were living together in this Commonwealth as husband and wife in reliance upon a marriage ceremony performed in another State which was valid there and in every State except Massachusetts, and that by the term "wife" the insured meant to designate such person, she is lawfully the beneficiary under the policy, irrespective of the question whether she was the legal wife of the insured in this Commonwealth.

In this Commonwealth it is settled law that, in the absence of any indication that the transaction was intended as a wagering contract, the beneficiary designated in a policy of life insurance need not have an insurable interest.

CONTRACT, by the administratrix of the estate of Eugene J. Brogi for $9,888, being the amount of two policies of insurance on the life of the plaintiff's intestate collected by the defendant from the Travelers Insurance Company of Hartford, Connecticut. Writ dated October 28, 1908.

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In the Superior Court the case was tried before *Lawton*, J. The plaintiff was the former wife of Brogi and obtained a divorce from him on the ground of adultery by a decree made on June 23, 1903. Brogi after the plaintiff left him kept a room at the defendant's lodging house. The defendant knew that he had been divorced and had two children. She testified that she thought that Brogi had procured a divorce. On December 29, 1903, the defendant and Brogi went to New York and there entered into a marriage and returned to Boston and thereafter lived as husband and wife. On June 21, 1905, the defendant and Brogi entered into a second marriage in Boston and thereafter continued to live as husband and wife.

On December 19, 1904, and on August 3, 1905, Brogi applied to the Travelers Insurance Company at Hartford for two twenty-payment life insurance policies of $5,000 each on his own life. In both applications he stated in his answer to the question whether he was married, that he was married and that he desired the policies payable at his death to Mary E. Brogi. When asked to give the full name, relationship and residence, he gave the relationship as "wife" in both applications; and he gave the residence as "Winthrop, Mass." At the time the applications were signed and the policies of insurance were issued the insured and the defendant lived together as husband and wife at Winthrop. The policies were issued by the company respectively on December 21, 1904, and on August 5, 1905, and the beneficiary named in them was Mary E. Brogi, wife. On the death of Brogi, on March 11, 1906, the insurance company paid to the defendant $9,888 as beneficiary under the policies. The defendant testified that she helped to pay the premiums on the first policy and paid all the premiums on the second policy out of her own money earned by keeping boarders and lodgers.

When the plaintiff was appointed administratrix of the estate of Brogi by the Probate Court, the defendant appealed to the Supreme Judicial Court and contended that she was entitled to be appointed administratrix on the ground that she was the wife of the deceased. The decree of the Probate Court was affirmed.

At the close of the plaintiff's evidence the judge ruled that there was no evidence to submit to the jury, and ordered a verdict for

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the defendant. The plaintiff alleged exceptions, raising the questions stated in the opinion.

A. Berenson, for the plaintiff.

J. S. Slater, for the defendant.

HAMMOND, J. The policies being based upon the interest of the assured in his own life were supported by an insurable interest, and so far as respects this matter were valid.

The beneficiary named was "Mary E. Brogi, wife" of the assured. It is argued by the plaintiff that the defendant was made a beneficiary in her capacity as a wife and not as an individual; that she was not the lawful wife of the assured and hence was not a legal beneficiary. But this position is untenable. The defendant had been through two marriage ceremonies with Brogi, one of which took place in the State of New York. This, even if void here by reason of our statutes (R. L. c. 152, § 21; c. 151, § 10), was nevertheless valid in that State and hence valid everywhere except in this Commonwealth. And while we may not recognize the validity of the marriage when she is here seeking the rights of a wife under our laws, we must not close our eyes to the fact that there has been a marriage ceremony between her and Brogi; that at the end of that ceremony they stood side by side as lawfully wedded husband and wife under the laws of the State of New York and of every other State except Massachusetts. See *Whippen* v. *Whippen*, 171 Mass. 560. At the time the policies were procured the parties were living together as husband and wife in reliance upon the marriage ceremonies. In the interpretation of the language of the policy we are not to determine whether in this State the beneficiary was the legal wife of the insured, but whether by the term "wife" he meant her; and there can be no doubt that he did. She was the person named as the beneficiary whatever may have been her relation to him.

It is next argued that the defendant, not being here recognized as the legal wife of the beneficiary, had no beneficial interest in the life of the assured, and that consequently she was not a lawful beneficiary. It may well be doubted whether under the peculiar relation she sustained to her reputed husband she had not an insurable interest in his life. But we have not found it necessary to consider that question.

Whether an assignee or a beneficiary must have an insurable

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interest in the life insured is a question upon which there is an irreconcilable conflict among the authorities. See among other cases *Warnock* v. *Davis*, 104 U. S. 775; *Gilbert* v. *Moose*, 104 Penn. St. 74; *Russell* v. *Grigsby*, 168 Fed. Rep. 577; *Gordon* v. *Ware National Bank*, 132 Fed. Rep. 444; *Clark* v. *Allen*, 11 R. I. 439; *Grigsby* v. *Russell*, 222 U. S. 149, and the cases therein respectively cited. For a collection of the cases see also 57 Amer. Dec. 94, 95. The law in this Commonwealth has been settled, and it is now held, in accordance with what seems to be the great weight of authority, that in the absence of any evidence indicating that the transaction was intended as a wagering contract it is not necessary that the beneficiary or assignee should have an insurable interest. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24. *Campbell* v. *New England Mutual Life Ins. Co.* 98 Mass. 381. There was no evidence in this case that a wagering transaction was intended by the parties. The validity of the designation of the beneficiary is not affected by her want of an insurable interest in the life insured. She was a legal beneficiary even if she had no insurable interests.

The evidence that the plaintiff while living with Brogi as his wife was infected by him with a venereal disease was properly excluded as immaterial.

The evidence as to the mental capacity of Brogi at the time the contracts were made was insufficient to warrant a finding that he was not capable of making those contracts. Nor was there any evidence of undue influence or fraud on the part of the defendant.

Exceptions overruled.

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THOMAS SHELLY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

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Suffolk. January 16, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DECOURCY, JJ.

Street Railway. Negligence, Liability to trespasser.

A street railway corporation owes to a boy ten years and five months old, who is stealing a ride on the rear end of one of its cars, only the duty to refrain from wilfully or wantonly and recklessly exposing him to danger, and it is not evidence of the violation of such duty that the conductor in a gruff voice told the boy to get off the car and shook his fist close to the boy's face, and that the boy was frightened by the conductor's tone of voice and tried to get off but could not and lost his balance and fell.

TORT by a boy, ten years and five months old when injured, for personal injuries sustained from having fallen off or jumped off a moving car of the defendant on which the plaintiff was stealing a ride. Writ dated July 10, 1909.

In the Superior Court the case was tried before *Dana,* J. The plaintiff testified that the car was a semi-convertible one, that he approached it while it was standing still and stepped on the fender at the rear, hiding himself from the conductor, that he was standing on a connecting bar a little higher than the fender and was clinging to the window sill. The plaintiff further testified that after the car had gone five or six car lengths the conductor looked around and as he did so shook his fist. "He was gruff and coarse, and he told me to get off, and he held his hand closed." "He turned around, and with closed fist, he made me — he told me to get off." "By his tone he frightened me, and I could not get off." "When he said 'get off' he shook his fist, and leaned over the window, his fist came right close to my face." "I tried to get off, but couldn't — by his tone he frightened me, and I could not get off." The plaintiff testified that he lost his balance and did not know what happened then.

The judge ordered a verdict for the defendant, and at the request of the parties reported the case for determination by this court. If his ruling was right, judgment was to be entered for the defendant upon the verdict; if wrong, judgment was to be entered for plaintiff in the sum of $300.

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J. J. O'Connor, for the plaintiff.

H. S. MacPherson, for the defendant.

HAMMOND, J. The plaintiff was a wilful trespasser; and to him "the defendant owed no duty, except to refrain from wilfully or wantonly and recklessly exposing him to danger." Knowlton, C. J., in *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130, 132. It is unnecessary to recite the evidence in detail. It is contradictory in many respects, but even if it be taken in the light most favorable for the plaintiff it falls far short of showing that the defendant failed to perform the limited duty it owed to the plaintiff. The case must stand in the class with *Bjornquist* v. *Boston & Albany Railroad, ubi supra; Albert* v. *Boston Elevated Railway*, 185 Mass. 210; *Massell* v. *Boston Elevated Railway*, 191 Mass. 491; *Anternoitz* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 542; *Lebov* v. *Consolidated Railway*, 203 Mass. 380, and similar cases.

Judgment on the verdict.

THOMAS J. O'TOOLE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 6, 1912. — May 21, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway.

If a man, before starting to cross an unobstructed street fifty feet wide on which are parallel tracks of a street railway, looks in both directions and sees a car three hundred feet distant approaching upon the farther track, and, having formed the opinion that it is safe to cross, proceeds to do so upon a cross walk, walking at a rate of less than three miles an hour without paying further attention to the approaching car, and is struck by the car and injured, he is not negligent as matter of law.

TORT for personal injuries from being run into by an electric street car of the defendant at about six o'clock P. M. on January 2, 1907, while the plaintiff was crossing Broadway, in that part of Boston called South Boston, by a cross walk at the corner of F Street. Writ dated March 2, 1907.

In the Superior Court the case was tried before *Dana*, J., who

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at the close of the plaintiff's evidence ordered a verdict for the defendant and reported the case for determination by this court. If the ordering of the verdict was right, judgment was to be entered for the defendant; if wrong, there was to be a new trial.

A. T. Smith, for the plaintiff.

M. J. Sughrue, for the defendant.

SHELDON, J. Taking as we must that view of the evidence which is most favorable to the plaintiff, it could be found that before starting to cross the street he looked in each direction and saw the car that afterwards struck him coming toward him upon the farther track. The car was then about three hundred feet distant from the cross walk by which he undertook to cross the street. He formed the opinion that he had sufficient time to pass, and attempted to do so, walking not very rapidly, at less than three miles an hour, without paying further attention to the car. The street was unobstructed. He was struck by the car and injured.

Upon these facts the question of his due care was for the jury to determine. It was not manifestly careless for him to presume that a car three hundred feet away, from which he was in plain sight, would not run so rapidly as to hit him in crossing a street about fifty feet wide, as was indicated by the plan in evidence. The case comes within the rule of *Lunderkin* v. *Boston Elevated Railway, ante,* 144; *Mullen* v. *Boston Elevated Railway,* 209 Mass. 79; *Albee* v. *Boston Elevated Railway,* 209 Mass. 6; *Hunt* v. *Old Colony Street Railway,* 206 Mass. 11; and *Jeddrey* v. *Boston & Northern Street Railway,* 198 Mass. 232. The circumstances differ from those which appeared in the decisions relied on by the defendant. In *Holian* v. *Boston Elevated Railway,* 194 Mass. 74, the car which hit the plaintiff was very much nearer to her when she started to cross the street, and she stepped in front of the car. In *Hall* v. *West End Street Railway,* 168 Mass. 461, the plaintiff, who was very deaf, looked neither to the right nor the left and did not see the car that struck him, although it was in plain sight for a distance of three or four hundred feet.

There was evidence of negligence of the defendant's motorman, which might have caused the injury. Indeed there has been no argument to the contrary.

New trial ordered.

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PETER BREEN, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 19, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Due care of plaintiff, In use of highway.

At the trial of an action against a street railway company under R. L. c. 111, § 267, for the death of a girl seven years of age who was run into by a car of the defendant as she was crossing a public street, there was evidence tending to show that the accident happened on a bright clear day, that, before attempting to cross the street, the girl looked up and down it from the curbstone, and that she again looked in the direction from which the car was coming before she got on the track, that when she was six feet from the track the car was four or five car lengths away and was coming fast, one witness testifying that it was being run at the rate of twenty miles an hour, and that no gong or warning signal was sounded, that the track was straight and the motorman had a clear view, that when the girl was struck she was nearer the farther rail, and that after the car struck her it went about one hundred feet before it could be stopped. *Held*, that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury.

TORT under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1, by the administrator of the estate of Helen Josephine Breen to recover for her death alleged to have been caused by gross negligence of the motorman of a street car of the defendant, as a result of which the car ran into the plaintiff's intestate, then seven years of age, as she was crossing Sumner Street in East Boston. Writ dated August 7, 1908.

In the Superior Court at the close of the evidence the presiding judge ordered a verdict for the defendant and by agreement of counsel the case was reported for determination by this court, judgment to be entered on the verdict if his ruling was right, and otherwise the case to "stand for trial on the merits." The material facts are stated in the opinion.

The case was submitted on briefs.

J. P. Magenis, J. Wentworth & J. E. Kavanaugh, for the plaintiff.

R. A. Stewart & L. R. Chamberlin, for the defendant.

MORTON, J. By its argument the defendant in effect concedes, and rightly we think, that in view of the age, intelligence and experience of the child, she could properly be sent unattended on

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errands that would take her into and across the street. But it contends that, on the evidence, she was not, as matter of law, in the exercise of the care required of a child of her age and experience. We think that that was a question for the jury.

The accident happened at about 5.30 P. M., on April 25, 1908. The afternoon was bright and clear. There was evidence tending to show that the child stood on the curbstone and looked up and down the street "to take," as one witness testified she supposed, "precaution;" that while crossing she looked up the street again, that being the direction from which the car came; that when she was about six feet from the track the car was from four to five car lengths away, a distance we assume of one hundred and twenty to one hundred and fifty feet; and that when she was struck she was on the track and nearer the farther rail than the rail that she first crossed. There was evidence, which bore both upon her due care and the negligence of the defendant, that tended to show that no gong was sounded, that the car was coming fast, — twenty miles an hour one witness testified, — that, as bearing on the speed of the car, it ran, after the accident, about one hundred feet before the motorman could stop it, and that the street was straight and there was nothing to obstruct the view of the motorman. There were inconsistencies and contradictions in the evidence, but those were matters for the jury to deal with. In almost any view of the evidence it is plain, we think, that the child attempted to exercise some care in crossing the street. Cases like *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8, where it was held that no care was shown, do not therefore apply. Whether the care and judgment that were exercised were such as naturally might be expected of such a child, and, as bearing upon that, to what extent, if any, she might rely upon the motorman's seeing her and slackening his speed and so enabling her to cross in safety, were matters which we think rendered the question of due care, as already observed, one for the jury. See *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126; *Purcell* v. *Boston Elevated Railway*, 211 Mass. 79; *Lunderkin* v. *Boston Elevated Railway*, *ante*, 144; *O'Toole* v. *Boston Elevated Railway*, *ante*, 517.

The defendant has not argued that there was no evidence of negligence on the part of the motorman, and we think it plain, from the matters already referred to relating to the speed of the

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car and his failure to slacken it and his unobstructed view, to say nothing of his alleged failure to sound the gong or give any warning, that there was such evidence.

In accordance with the terms of the report the entry will be, case to stand for trial on the merits.

So ordered.

AUGUSTUS O. JONES *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 20, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Way, Public. *Prescription. Conflict of Laws. Negligence,* Railroad, Licensee.

Where a question at issue at a trial was whether a certain road in Connecticut was a public way by prescription and there was evidence that the law of Connecticut required for the establishment of such a way fifteen years' uninterrupted use, but there was no further evidence of the law of Connecticut as to the nature of such use, it must be presumed that the common law of Connecticut is the same as that of this Commonwealth in requiring that the use should be adverse as well as continuous.

Where in a deed of land to a railroad company the grantor reserved a right of way across the railroad tracks for himself and his successors in title and those having business with him and them, and the way is used by such persons and incidentally by the general public by permission of the grantor and his successors, there is no such adverse use by the general public as is necessary for the creation of a public way by prescription.

Although a way may have been used by the general public adversely to the rights of the owner and for a period sufficient to give rise to a prescriptive right to its use if the use were continuous and uninterrupted, if it appears that the way was wholly within land of a manufacturing corporation which maintained at one end of it a gate which was closed and locked at times, and at the other end at times a chain attached to posts which prevented access to the way, no public way by prescription has been acquired.

A railroad company cannot be found to have invited a member of the general public to use a crossing at grade over its railroad on a private way which was wholly within land of a private owner and was maintained at his expense, if the railroad company did not plank the crossing, made no graded approaches to it and maintained no sign nor flagman there, and it does not appear that any of the railroad company's officers or agents knew that the general public ever used the way. A member of the general public so using the crossing is at most a bare licensee to whom the company owes no duty greater than to refrain from wanton or wilful misconduct toward him.

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DeCourcy, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while driving over the tracks of the defendant in that part of the town of Thompson known as Mechanicsville in the State of Connecticut. The place of the accident was within the premises of the French River Textile Company. The road upon which the plaintiff was driving led into the lands and buildings of that company and was kept in repair by it, as it had been by its predecessor in title who originally laid it out. The way never was laid out or accepted by public authorities.

The first contention of the plaintiff is that this road had become a public way by prescription, and that accordingly the provisions of the General Statutes of Connecticut (§ 3787) with reference to sounding bells and whistles at crossings applied.* Under the laws of that State introduced in evidence, a period of fifteen years' uninterrupted use is necessary in order to acquire such right of way. (Gen. Sts. Conn. § 1073); and in the absence of anything to the contrary the common law of Connecticut is presumably the same as that of this Commonwealth in requiring the use to be adverse, continued without interruption, and with the acquiescence of the owner. *Bence* v. *New York, New Haven, & Hartford Railroad,* 181 Mass. 221. An examination of the testimony discloses no such public prescriptive right. The way across the tracks was created solely as a private way, for the convenience of the mill owner who conveyed the premises to the defendant's predecessor in title,† and appears to have been used mostly by employees and others having business at the factory. The use of the crossing by the general public seems to have been merely incidental to an open private way and by permission of its owner, according to the testimony of the only witness whose observation covered the period of fifteen years.

Assuming, however, that there was some evidence for the jury

* The statutes related to crossings with "any highway" at grade.

† The language of the deed to the railroad company as to the way was as follows: "The Grantor also reserving to himself, his heirs and assigns, the right to make and maintain at his and their expense such passageway under or over said Railroad as may be necessary or convenient for farming purposes or for the business connected with the factory of the Grantor, his heirs or assigns, and which pass-way shall be so constructed as not to injure or interrupt the business of the said railroad."

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that the public use of the way was adverse, the uncontradicted testimony shows that this use was interrupted and not continuous. Upon the Mechanicsville end of the road, across the bridge, was a gate which was closed and locked at times, preventing access to the mill property; and at the West Thompson end was a chain attached to posts which from time to time during the period in question prevented access to the way. Clearly the evidence would not warrant a finding that the way over which the plaintiff was crossing was a public way, and consequently the statutory requirements as to sounding bells and whistles at a highway crossing do not apply. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300. *Sprow* v. *Boston & Albany Railroad*, 163 Mass. 330. *Aikens* v. *New York, New Haven, & Hartford Railroad*, 188 Mass. 547.

The evidence does not support the contention that the defendant invited the plaintiff to use this crossing. Under the reservation in its deed the railroad company was bound to leave the crossing open for the convenience of the Textile Company and those having business dealings with it. The defendant did not plank the crossing, nor grade its approaches; it maintained no gate or flagman or signs; and did no act which could be construed as an express invitation to the public; and it does not appear that it knew that the crossing was being used by any persons except those who were entitled to do so of right. Nor was there any implied representation by the defendant to the plaintiff that the way was one which might be used with safety, or an inducement to use it as such. The way was laid out entirely within the enclosed premises of the Textile Company and maintained by it; the entrances were guarded by gates and chains; the plaintiff knew that it led directly into the factory yard, and had seen the chain when he entered the Thompson road; everything in sight indicated the true character of the way. When the plaintiff, for his own convenience, undertook to pass through this private way as a short cut between Thompson and Mechanicsville, he was at most a bare licensee and used the premises at his own risk; and as there was no evidence that the defendant was guilty of any wanton or wilful conduct, the trial judge * rightly directed a verdict in its favor. This conclusion renders it unnecessary to consider the

* The trial was before *Holmes*, J. After his death, the exceptions were allowed by *Hitchcock*, J.

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issue of the plaintiff's due care. *Moffatt* v. *Kenny*, 174 Mass. 311. *Bowler* v. *Pacific Mills*, 200 Mass. 364. *O'Brien* v. *Union Freight Railroad*, 209 Mass. 449.

Exceptions overruled.

G. E. Tebbetts, for the plaintiff.

J. L. Hall, for the defendant.

JOHN HENNESSEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 20, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of highway, Street railway.

At the trial of an action for personal injuries against a street railway company by a boy who when injured was less than twelve years of age, there was evidence tending to show that, while the plaintiff was walking along a sidewalk of a street on which street cars ran in the same direction as that in which he was going, he had to turn out into the street to avoid obstructions placed upon the sidewalk by a builder which extended for about one hundred and twenty-five feet along the street, that there were two fences, one at each end of the obstructed portion of the street, which left fifteen or eighteen inches between them and the nearer rail of the street railway track, that before passing the first fence the plaintiff looked to see whether a car was coming and saw none, that when about midway between the fences he looked to see whether his companions who were with him were following him and saw that they were directly behind him, but that he did not look for a car then, that he heard no gong or bell of a car, that as he was going around the end of the second fence he was struck by a car, which ran from two hundred to two hundred and fifty feet farther before it was stopped, and that the motorman's view as he approached the plaintiff was unobstructed. *Held*, that the questions of the plaintiff's due care and of the negligence of the motorman were for the jury.

MORTON, J. This case comes here on exceptions by the defendant to the refusal of the trial judge * to rule that there was no evidence that the plaintiff was in the exercise of due care or that the defendant was negligent. We think that the questions thus presented were both rightly submitted to the jury.

1. At the time when the accident happened the plaintiff was between eleven and twelve years of age. The sidewalk of the street along which he was passing was obstructed for about one hundred and twenty-five feet by building operations. At each

* *White*, J.

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end of the obstruction was a fence extending several feet into the street.* The plaintiff testified that when he reached the obstruction he turned from the sidewalk into the street for the purpose of passing along by the obstruction, and that as he passed by the first fence he looked to see if a car was coming and saw none and went along between the obstructions and the track until he got to the other fence, when as he turned out to go round it, he was struck by a car and thrown against the fence, breaking his left leg. He also testified that when about midway between the fences he looked round to see where the boys who were with him were and that they were right behind him, but did not look for a car, and that before he was struck he heard no gong or bell. There was nothing to show how often the cars ran through the street. The plaintiff lived near the scene of the accident and was familiar with the locality. It was for the jury to say whether the plaintiff exercised such care as he was bound to exercise and as naturally would be expected from a boy of his age, and whether he should have looked again to see if a car was coming, and whether he might not rely, though unconsciously perhaps, upon being warned by the motorman and the boys with him if a car did come along. See *Howland* v. *Union Street Railway*, 150 Mass. 86. It was also for the jury to say whether he was hit by the front of the car or by the running board, and whether the accident occurred in consequence of the plaintiff and his companions attempting to steal a ride or in the manner in which the plaintiff testified that it did.

2. There was evidence that the motorman's view of the street was unobstructed and that the car ran from two hundred to two hundred and fifty feet after the accident before it was stopped. The testimony of the motorman and that of other witnesses for the defendant tended to contradict that of the plaintiff and his witnesses as to the manner in which the accident happened. But it was for the jury to say, taking all the circumstances into account, whether the motorman exercised due care. See *Mullen* v. *Boston Elevated Railway*, 209 Mass. 79.

Exceptions overruled.

F. M. Ives, for the defendant.

J. P. Walsh, for the plaintiff.

* There was evidence that the ends of these fences were within fifteen or eighteen inches of the nearer rail of the defendant's track.

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PHILADELPHIA AND READING COAL AND IRON COMPANY *vs.* CITY OF BOSTON.

Suffolk. March 21, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Damages, In abolition of grade crossing. *Evidence*, Relevancy and materiality, Presumptions and burden of proof. *Deed*, Recording. *Landlord and Tenant*.

At the trial of a petition for the assessment of damages alleged to have been suffered by a corporation engaged in receiving, storing and selling coal on a wharf by reason of the abolition of a grade crossing of a railroad and a highway, where the petitioner contends that the change of grade made less valuable the railroad facilities available for its use, it is proper to admit evidence offered by the respondent as to the number of tons of coal shipped by the petitioner by railroad during the three years preceding and the three years following the change of grade, if the presiding judge instructs the jury that the evidence is to be used not as bearing upon what business the petitioner did before and after the change, but solely as bearing upon the questions, what effect the change had upon the railroad facilities at the petitioner's command, and how it affected the market value of the petitioner's premises.

At the trial of a petition by a corporation which was in possession of land under a lease in writing for the assessment of damages alleged to have been suffered by reason of the abolition of a grade crossing of a railroad with a highway, an issue was, whether the petitioner had surrendered to the lessor a portion of the premises leased, and *it was held* that, upon conflicting evidence, that question properly was left to the jury.

At the trial of a petition against a city for the assessment of damages alleged to have been suffered by the abolition of a grade crossing of a railroad with a highway, where it appears by the petition that the petitioner's title to the land alleged to have been damaged was under a lease in writing for a term of twenty years dated before the institution of the proceedings for the abolition of the crossing, and a copy of the lease is annexed to the petition, and, although at the time of the filing of the petition the lease never had been recorded in accordance with R. L. c. 127, § 4, it was recorded before the completion of the trial, it is proper for the judge to refuse to rule that the lease was not valid as against the respondent and could not be used for the purpose of increasing damages.

At the trial of a petition for the assessment of damages alleged to have been suffered by reason of the abolition of a grade crossing of a railroad with a highway, where it appears that the petitioner is a corporation engaged in the coal business on a wharf which it held under a lease from one who owned a larger tract which included the wharf, and that the petitioner claimed damages because of loss of access to the wharf, it is proper for the judge to refuse to rule in substance that the assessment of damages should be "the same as if the owner of the fee was the only party interested," and that, if the portion of the entire

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wharf property leased to the petitioner was of as much value as a part of the lessor's property after the change of grade as it was before, then the jury should find for the respondent even though the petitioner's leasehold estate had been damaged.

MORTON, J. This is a petition for the assessment of damages alleged to have been caused to a leasehold estate belonging to the petitioner by a change in the grade of Chelsea Bridge Avenue so called. Chelsea Bridge Avenue connects Charlestown and Chelsea. The premises leased by the petitioner are a part of the Mystic Docks so called. The tracks of the Boston and Maine Railroad crossed the avenue at grade to the docks. The change of grade consisted in elevating the avenue twenty-two feet above its former level by means of a viaduct or bridge which permitted the free passage of cars underneath it. The premises occupied by the petitioner abutted on the avenue and were leased by it from the Boston and Maine Railroad for twenty years from May 1, 1890. The lease was dated May 6, 1890. The Boston and Maine Railroad held under a lease for ninety-nine years from the Boston and Lowell Railroad Corporation. The petitioner's lease was not recorded till December 14, 1900, after the petition in this case was filed, and the respondent alleges that its existence was not known to the public authorities either at the time when the act, St. 1892, c. 374, under which the proceedings for a change of grade were instituted was passed, or at the time when the decree of the Superior Court authorizing the change was entered, September 6, 1893. The petitioner erected on the premises leased by it an extensive plant for the reception, storage, sale and shipment of coal. The petitioner contended and introduced evidence tending to show that in 1892 a portion of the premises leased by it was surrendered to the lessor. It was agreed that the rent was reduced from $20,000 per annum to $15,000 per annum, and that that was the amount paid from and after November 1, 1892. Whether there was in fact a release of a part of the demised premises to the lessor was controverted by the respondent. The effect of the release, if there was one, was to leave the petitioner without any access to and from its premises and the highway after the change in grade. There was a verdict for the petitioner, with the amount of which it is dissatisfied. The case is here on exceptions by both parties.

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We take up first the exceptions of the petitioner. The first exception was to a ruling in regard to the auditor's report. This exception has not been pressed or argued, and we treat it as waived. The ruling was clearly right. *Wheeler* v. *Wheeler*, 116 Mass. 297.

The next exception was to permitting one of the petitioner's witnesses to testify on cross-examination that since 1895, when the change in grade took place, the price of coal by the Philadelphia and Reading, Delaware and Lackawanna, and Lehigh and Wilkesbarre coal companies at all the wharves in Boston had been uniform. The witness had testified on direct examination that it was a recognized part of the coal business in Boston for coal dealers to supply coal to customers by teams driven to the wharves and not belonging to the coal dealers. For the purpose of rebutting an inference which would or might be drawn from this evidence that this branch of the petitioner's business would be affected because such customers could not get to the petitioner's premises as readily as before, it was competent for the respondent to show that the petitioner's yard was so situated with reference to other yards, and the price of coal was such, that there was no inducement for such customers to go to the petitioner's yard. We think that the evidence was rightly admitted.

The next exception was to the admission of evidence offered by the respondent as to the number of tons of coal shipped by the petitioner over the Boston and Maine Railroad during the three years preceding the change of grade and during the three years following it. This evidence was admitted, as the presiding judge * instructed the jury, not as bearing upon what business the petitioner did before and after the change of grade, but solely as bearing upon the question whether the railroad facilities were better after the change of grade and in consequence of the change of grade; and whether the market value of the premises occupied by the petitioner, considered with reference to its usefulness for the business for which it was adapted, was affected by the change of grade. The jury were expressly told that they must not use the evidence except for this narrow purpose. We think that the evidence was clearly competent for the purpose for which it was thus admitted.

* *DeCourcy*, J.

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The last exceptions by the petitioner were to the refusal of the presiding judge to give certain rulings that were requested to the effect that a portion of the premises leased to the petitioner had been surrendered by it to the lessor, and to the instructions given by the presiding judge to the effect that the question was one of fact for the jury to pass upon. It appeared, or there was evidence tending to show that there were negotiations between the lessor and lessee, extending over a period of several months, in regard to a surrender of a part of the leased premises and a reduction of the rent. Considerable correspondence relating to the matter was introduced by the petitioner, and Mr. McLeod, who was president of both corporations at the time, deposed that an oral agreement for a modification of the lease and a surrender to the Boston and Maine Railroad of a portion of the demised premises was made by him as president of the two companies, with the knowledge and approval of the directors of both companies; that the precise boundaries of the released portion were not determined at the time, but were left to be defined and staked out by the engineer of the petitioner, and that it was reported to him that that had been done; that in consideration of the surrender the rent was reduced to $15,000 per annum, which was the amount that was paid from and after November 1, 1892; and that after November 1, 1892, the Boston and Maine Railroad took and held possession of the portion of the demised premises that were thus surrendered. There was also evidence tending to show that after the agreement referred to by Mr. McLeod, the superintendent of the Mystic Docks and an engineer of the Boston and Maine Railroad staked out a line showing the territory released, and it appeared that soon after November 1, 1892, the Boston and Maine Railroad extended its tracks through and erected a building upon that part of the premises alleged by the petitioner to have been released. On the other hand "there was evidence," as the exceptions recite, "that the coal company continued to use the territory which was said to have been relinquished in exactly the same way and to the same extent that it did before." It appeared in evidence and was found as a fact by the auditor that there was no record of any vote of the directors of the Boston and Maine Railroad or of the petitioning corporation authorizing or ratifying any change in the lease, although the directors of the Boston and Maine

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Railroad had a clerk whose duty it was to enter all proceedings in the record. There was also in evidence a letter from the general manager of the Boston and Maine Railroad to its general auditor, in which it was stated that the rent paid by the petitioner was reduced from $20,000 per annum to $15,000 per annum, "in consideration of such changes as have been and are to be made at that point by laying additional tracks, etc. for the benefit of the Boston and Maine Railroad, and the lease by the Boston and Maine Railroad to the Philadelphia and Reading Coal Company is therefore amended so far as the rental to be paid by them is concerned as above." In addition the jury took a view and could judge from what they saw whether, as bearing on the question whether there was in fact a surrender, it was probable that a line would have been staked out where it was said to have been staked out. On this branch of the case the presiding judge instructed the jury in substance that the lessor and lessee could agree to cancel the lease as to a part of the leased premises, and that no written instrument was required; that if there was a giving up of a part by the coal company and an acceptance of it by the railroad company, the coal company ceased from that time to have any rights in the portion so surrendered; that to make the surrender valid the transaction would have to be authorized by the boards of directors of the two corporations, though it was not necessary that there should be a record in writing of their action, and that it was for the jury to say what weight, if any, as bearing on the question whether there was a surrender, should be given to the fact that there was no record of it; that if there was a surrender any use afterwards with the consent of the landowner of the part surrendered would not prevent the full operation of the surrender, and that the use after the surrender of the part surrendered was important only as bearing on the question whether there was in fact a surrender. We think that the instructions thus given were correct, and were all that the case called for on this branch of it.

The question whether there was or was not a surrender was one of fact for the jury under suitable instructions. The question whether the market value of the demised premises had been enhanced by the change of grade through the improved facilities claimed to have been afforded for the shipment of coal by rail was also for the jury. It was for them to say how much or how

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little weight the testimony of those witnesses who testified in regard to that matter was entitled to and what inferences were to be drawn from it. The result is that the petitioner's exceptions must be overruled.

We pass to the respondent's exceptions. The first exception was to the refusal of the presiding judge to rule as requested that the lease under which the petitioner claims "being for twenty years and not being recorded in the registry of deeds is not valid against the City of Boston and cannot be used for the purpose of increasing damages. 'No contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more' than it would have had to pay had the private contract not been in existence. This would be true even if the lease were for less than seven years." The sub-quotation is from *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1, 15. The ruling requested is based on R. L. c. 127, § 4, which provides that a conveyance or a lease for more than seven years shall not be valid against any person except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it is recorded. The object of the statute is to protect those taking title *bona fide* from a prior unrecorded deed or lease of which they have no notice. See *Earle* v. *Fiske*, 103 Mass. 491. Even if it be assumed, therefore, that the effect of the proceedings was to impose a servitude upon the demised premises, and to that extent to constitute a taking by the respondent, it would seem that, since the respondent does not take title from the Boston and Maine Railroad but by a right superior to and independent of the railroad company, the statute cannot apply. But, however that may be, it is settled that the deed or lease may be recorded after suit is begun and during the trial, (*Wolcott* v. *Winchester*, 15 Gray, 461, 467; *Howland* v. *Crocker*, 7 Allen, 153; *Anthony* v. *New York, Providence & Boston Railroad*, 162 Mass. 60,) and in this case the respondent had actual notice of the lease when the petition was filed, as there was a copy of the lease attached to the petition. The ruling asked for was rightly refused.

The remaining exception was to the refusal of the presiding judge to rule as requested in the second and third rulings asked for, that the assessment of damages should be "the same as if

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the owner of the fee was the only party interested," and that if the portion of the entire wharf property belonging to the Boston and Maine Railroad leased to the petitioner was of as much value as a part of such property as it was before, then the jury should find for the respondent even though the petitioner's leasehold estate had been damaged. The rulings asked for assumed that if the Boston and Maine Railroad as the owner of the entire wharf property could recover no damages by reason of the change in grade, the petitioner as the owner and holder of a leasehold estate in a portion of the premises could recover none. This was clearly wrong as applied to the facts in this case. *Galeano* v. *Boston*, 195 Mass. 64, is directly to the contrary. See *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, 598. We think that the rulings requested were rightly refused. It follows that the respondent's exceptions must also be overruled.

Petitioner's exceptions overruled; respondent's exceptions overruled.

R. M. Morse, (*J. R. Lazenby* with him,) for the petitioner.

J. J. Corbett & K. Adams, for the respondent, submitted a brief.

THOMAS F. BRANNAN *vs.* ELIOT FIVE CENTS SAVINGS BANK.

Suffolk. March 25, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, & DECOURCY, JJ.

Savings Bank. Assignment.

If a depositor in a savings bank delivers to another person his bank book and an order in writing on the bank to pay to such person the amount standing to the depositor's credit with the bank, a valid assignment and transfer of the deposit is effected and the transferee receives a complete title thereto which the bank is bound to recognize although the book and the order are presented two hours after the depositor's death and the bank has notice of the death.

CONTRACT for the amount of a deposit placed with the defendant bank by one Patrick J. Brannan, who on March 3, 1911, three days before his death, delivered to the plaintiff, his brother, the

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deposit book together with an order in writing signed by him and directing the payment to the plaintiff of the amount standing to his credit on account of the book. The plaintiff presented the book and the order to the defendant within an hour or two of his brother's death, stating the fact of the death, and payment was refused by the defendant. Writ dated March 13, 1911.

In the Superior Court the case was heard by *Crosby*, J., without a jury.

St. 1908, c. 590, § 65, relied on by the defendant, reads as follows: "Such [savings bank] corporation may pay an order, drawn by a person who has funds on deposit to meet the same, notwithstanding the death of the drawer, if presentation is made within thirty days after the date of such order; and at any time if the corporation has not received written notice of the death of the drawer."

The by-law of the defendant relied on by the defendant was as follows: "On the death of any depositor, the money standing to the credit of such depositor shall be paid to the legatees, heirs-at-law, or legal representatives of such depositor, conformably to the laws of the State; and if the sum shall not exceed one hundred dollars, the same may be paid to the legatees, or next of kin, or legal representatives, without the expense of any probate of will, or letter of administration; provided however, that in case the deposit shall exceed one hundred dollars, the same may be paid as above provided, at the discretion of the committee on investment; and it is agreed that such payment shall discharge the corporation. If the deceased depositor leaves a will, the bank may require the executor or executrix to furnish it with an attested copy of the same, before making payment."

At the close of the evidence the defendant asked the presiding judge to rule that on all the evidence the action could not be maintained. The judge refused so to rule and found for the plaintiff in the sum of the amount of the deposit with interest; and the defendant alleged exceptions.

The case was submitted on briefs.

A. P. Worthen, for the defendant.

M. J. Sughrue, R. M. Bowen & T. F. Burns, for the plaintiff.

MORTON, J. The delivery of the bank book and order by the depositor to the plaintiff constituted a valid assignment and trans-

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fer of the deposit to him and gave him a complete title thereto. *Davis* v. *Ney*, 125 Mass. 590. *Kimball* v. *Leland*, 110 Mass. 325.

There is nothing in the statute referred to (St. 1908, c. 590, § 65) or the by-laws to prevent the plaintiff from maintaining this action. The statute merely provides that a bank may pay an order after the death of the depositor if presented within thirty days after its date. A similar provision exists in regard to the payment of checks. R. L. c. 73, § 17. The by-law provides for the payment, after the death of the depositor, of money standing to his credit to his legatees, heirs at law, or legal representatives, and has nothing to do with and does not affect in any way a transfer of a deposit by the depositor.

Exceptions overruled.

DANA H. ELKINS *vs.* ALBERT A. FELCH.

Middlesex. March 25, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Civil, Exceptions. *Negligence,* In use of highway.

In an action for personal injuries sustained by reason of a collision of an automobile driven by the defendant with a milk wagon in which the plaintiff was driving, where it appeared that the plaintiff was in the exercise of due care and that the defendant was negligent and the defendant admitted that he was entirely at fault in regard to the collision, exceptions of the defendant were adjudged to have been intended for delay.

TORT for personal injuries sustained by reason of a collision of an automobile driven by the defendant with a milk wagon in which the plaintiff was driving. Writ dated January 10, 1911.

In the Superior Court the case was tried before *Hitchcock*, J. The facts which appeared in evidence and the admissions of the defendant are stated in the opinion. The defendant asked the judge to rule that upon all the evidence as a matter of law the plaintiff could not recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $1,400. The defendant alleged exceptions.

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W. R. Bigelow, for the defendant.

E. L. McManus, for the plaintiff, was not called upon.

DECOURCY, J. The uncontradicted testimony tended to prove these facts: On June 9, 1910, at about 7.30 A. M., the plaintiff was carefully driving a horse attached to a covered milk wagon on the right hand side of North Main Street in Natick, and was within four feet of the sidewalk. There was no vehicle or obstruction ahead or on his left, and the travelled roadway was forty feet in width. The defendant, driving an automobile in the same direction, attempted to pass to the left of the wagon and ran the forward right spring of the machine into the left rear wheel of the wagon. As a result the wagon was driven into some trees, the horse broke away and the plaintiff was thrown to the ground and injured. In conversation with others and in his own testimony at the trial, the defendant admitted that he was entirely at fault for the collision. This testimony was in no wise controlled by the meagre evidence as to the horse's habits.

It appears that the exceptions are intended for delay. Upon motion of the plaintiff, double costs are awarded and twelve per cent interest on the amount of the verdict from the time when the exceptions were allowed.

Exceptions overruled.

MORANDA R. MARTIN *vs.* OLD COLONY STREET RAILWAY COMPANY.

Plymouth. March 25, 26, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Street railway. *Carrier*, Of passengers. *Evidence*, Competency.

A woman passenger in a vestibule street car, who, having followed a direction of the conductor to leave the car by the forward door, is attempting to alight from the front platform, is not negligent as matter of law in failing to hold up the skirt of her dress which hangs two inches from the ground.

In an action by a woman passenger against a street railway company for injuries sustained when the plaintiff was alighting from the front platform of a vestibule car of the defendant, it appeared that the conductor had directed the passengers to leave the car by the forward door, that the plaintiff walked out upon

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the platform and reached the first step when the bottom of her dress, which hung two inches from the ground, caught on the sand-plunger, which consisted of a metal pin projecting from the floor of the vestibule, and she was thrown down. The jury found in answer to special questions that the sand-plunger as it was located was necessary for the car and that it was in improper condition. There was evidence warranting a finding that the plunger projected farther above the floor than usual, and it could be inferred that this would not happen unless the pin was bent or worn or otherwise out of order. *Held*, that there was evidence for the jury that the accident was due to the defendant's negligence.

In an action by a woman passenger against a street railway company for injuries sustained, when the plaintiff was alighting from the front platform of a vestibule car of the defendant, by reason of the bottom of the plaintiff's dress catching on the sand-plunger, which consisted of a metal pin projecting two inches above the floor of the vestibule and held in place by its own weight, if it appears that the plaintiff in alighting from the car had been directed by the conductor to go through the front vestibule where it was necessary for her to pass near the sand-plunger which was likely to escape her notice, the jury can find that the motorman of the car in the proper performance of his duty to the plaintiff should have taken some precaution for her safety, either by temporarily removing the pin or guarding it with his foot or by warning her of its presence.

In an action by a woman passenger against a street railway company for injuries sustained, when the plaintiff was alighting from the front platform of a vestibule car of the defendant, by reason of the bottom of the plaintiff's dress catching on the sand-plunger, which consisted of a metal pin projecting two inches above the floor of the vestibule and held in place by its own weight, a witness, who testifies that in releasing the plaintiff's dress she did not pull up the pin, also may be allowed to testify that immediately after the accident the motorman pressed the sand-plunger down, this tending to show that at the time of the accident the pin was out of place and was higher than was necessary or usual.

TORT for personal injuries sustained by the plaintiff on January 10, 1908, when she was alighting from the front platform of a vestibule car of the defendant. Writ dated January 19, 1910.

In the Superior Court the case was tried before *Fessenden*, J. The facts which could have been found upon the evidence are stated in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover."

"3. The fact that the sand-plunger on which the plaintiff's dress was caught protruded one or two inches above the floor of the vestibule is of itself no evidence of the defendant's negligence."

"7. There is no evidence of any defect in the sand-plunger on which the plaintiff's dress caught, and your verdict must be for the defendant.

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"8. There is no evidence which will justify you in finding that the motorman was negligent because he did not remove the plunger before the plaintiff came out upon the platform to leave the car."

The judge refused to make any of these rulings, and submitted the case to the jury. He also submitted to them two special questions, which with the answers of the jury were as follows:

"1. Was the sand plunger as it was located necessary for the car?" The jury answered "Yes."

"2. Was it in improper condition?" The jury answered "Yes."

The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

Asa P. French, (*J. S. Allen, Jr.*, with him,) for the defendant.

O. Storer, for the plaintiff.

DeCourcy, J. As the plaintiff was alighting from the front platform of the defendant's car the bottom of her dress caught upon the sand-plunger in the vestibule and she fell to the pavement. The plunger is a metal pin with a round head; it is inserted vertically in a hole in the floor, within which it may move up and down freely, and is held in position by its own weight. When pushed down by the motorman's foot it presses against a lever upon which it rests, and thereby opens a valve in the sand box; and when the foot is removed a spring pulls the plunger back into place.

The jury were warranted in finding that there was no negligence in the conduct of the plaintiff contributing to the accident. The conductor had directed the passengers to leave the car by the forward door, and she had walked out upon the platform and reached the first step when her dress caught and she was thrown down. The bottom of her skirt hung two inches from the ground, and the defendant's contention that, as matter of law, she was careless because she failed to hold it up when alighting is untenable.

And we cannot say that the evidence did not warrant a finding that the accident was due to the defendant's negligence. The jury specially found that the sand-plunger was in improper condition. It is true the evidence on this point was meagre; but it would warrant a finding that the plunger projected farther above the floor than usual, and it could be inferred that this would not happen unless the pin was bent or worn, or otherwise out of order.

The judge rightly refused to give the eighth request. The defend-

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ant might be found liable for such an accident, even though the mechanism and appliances in the vestibule were in proper condition and adapted to perform the work for which they were installed. In alighting from the car the plaintiff had been invited to pass through the front vestibule and in close proximity to the electrical apparatus, brake gear and other equipment, and the duty devolved upon the defendant's motorman to protect her from any danger incident to their presence by the exercise of the highest degree of care consistent with the practical performance of all his other duties. If it became necessary for her to pass near a sand-plunger which normally projected two inches above the floor and was likely to escape her notice, the jury could find that the motorman in the proper performance of his duty to her should have taken some precaution for her safety, either by temporarily removing the pin, or guarding it with his foot or warning her of its presence.

What has been said disposes of the requests for rulings. The evidence that a different sand appliance was used on some of the defendant's cars is immaterial in view of the jury's answer to the first special question. The testimony that the motorman pressed the sand-plunger down into place immediately after the accident was rightly admitted. The witness added that when she released the plaintiff's dress she did not pull the pin up. This evidence tended to show at least that at the time of the plaintiff's injury the pin was out of place and higher than necessary or usual. *Kingman* v. *Lynn & Boston Railroad*, 181 Mass. 387.

Exceptions overruled.

STEPHEN J. CRONAN *vs.* HENRY HORNBLOWER & others.

Suffolk. March 26, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Agency, Scope of authority. *Stockbroker*. *Custom*.

In an action against a stockbroker by a customer for the amount of a dividend upon certain shares of stock, which had been placed by the plaintiff in the hands of the defendant for sale at a certain price and which the defendant had sold with the "dividend on" after the dividend had been declared and

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before it was payable, the defendant contended that by a custom of brokers, of which he introduced evidence, he had authority in such a case to sell with the "dividend on," and also contended that in order to carry out the plaintiff's instructions to sell the stock for the price named it was necessary to sell with the "dividend on." The judge instructed the jury in substance that, if they found that there was such a custom as was testified to or if they found that it was necessary for the defendant in order to carry out the instructions of the plaintiff to include the dividend in the sale, they must return a verdict for the defendant. The jury found for the plaintiff. *Held*, that the instructions were, at the least, sufficiently favorable to the defendant, and that the above questions were settled against the defendant by the verdict, the finding of the jury making it unnecessary to consider whether the alleged custom, if found to exist, would have been valid.

MORTON, J. This is an action against the members of a firm of stockbrokers, to recover the dividend on sixty-one shares of the common stock of the Draper Company which stood in the defendant's name at the time the dividend was declared, though admitted then to belong to the plaintiff. The sixty-one shares were part of one hundred shares belonging to the plaintiff, which in December, 1909, he gave the defendants an order to sell for him at $170, or better, per share. Subsequently, about February 1, 1910, he raised the price to $175 a share, or better. The defendants sold thirty shares, and as a matter of convenience had a certificate for the remaining seventy shares issued to them, giving the plaintiff a receipt therefor. Subsequently they sold nine more. The dividend was declared on June 20, 1910, and was made payable on July 1 to stockholders of record on June 20, and the sales already referred to were made before the dividend was declared. The remaining shares were sold after the dividend was declared and before it was payable, and were sold "dividend on," that is, the purchasers were to have the dividend. Neither the plaintiff nor the defendants knew that a dividend had been declared. The dividend in 1909 had been declared on the fourth Tuesday in June, and the defendants supposed that it would be declared in 1910 at about the same time in the month. The plaintiff gave no authority to the defendants to sell the stock "dividend on" after it had been declared, and claimed that the dividend belonged to him. He expected, as he testified, that as to the stock sold before a dividend was declared the purchaser would be entitled to the dividend if one was subsequently declared. The defendants contended that according to the custom and usages of brokers,

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of which they introduced evidence, when stock was left by a customer to be sold at a given price and a dividend was subsequently declared, the limit set by the customer was automatically reduced by the amount of the dividend and that this gave them the authority, in the absence of any express directions by the plaintiff in regard to the matter, to sell with the "dividend on." They also contended that in order to carry out the instructions of the plaintiff and sell the stock for the price named by the plaintiff, it was necessary for them to sell with the "dividend on;" and that on that ground also they had a right to sell the stock as they did. There was a verdict for the plaintiff, and the case is here on exceptions by the defendants to the refusal of the presiding judge * to give certain rulings that were requested.

It was conceded, and the presiding judge so instructed the jury, that ordinarily the sale of stock would not carry with it dividends that had been previously declared. But he further instructed them, as in substance requested by the defendants, that if they found that it was necessary in order to enable the defendants to carry out the instructions of the plaintiff and make a sale at the price named by him to include the dividend, then the authority to sell at the price named would include authority to transfer the dividend and the defendants would be entitled to a verdict in their favor.

He still further instructed them, also in substance as requested by the defendants, that "where a customer sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority on the broker to deal according to any well-established usages in that market or trade," and "a customer is bound by the established customs of trade in the dealing which he employs brokers to carry on for him;" and that if the defendants had paid the plaintiff the prices to which, in view of the usages and customs, if any, which the jury found entered into the transaction he was entitled, then likewise the defendants would be entitled to a verdict.

We think that these instructions were all that the case called

* *Hitchcock*, J. Among the requests refused were requests for rulings that the jury must find for the defendants, that the defendants were authorized to deliver the dividend and that the jury must find that the alleged custom existed.

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for and were sufficiently favorable, to say the least, to the defendants, and we see no error in regard to the instructions that were given and refused.

It was for the jury to say whether there was such a custom or usage as testified to, and also whether in making the sale which the defendants made it was necessary in order to carry out the instructions of the plaintiff to include the dividend.

In view of the finding of the jury it is not necessary to consider whether the custom testified to would be a valid custom.

Exceptions overruled.

H. W. Ogden, (*H. H. Bond* with him,) for the defendants.

J. W. McConnell, for the plaintiff.

ISRAEL NESSON *vs.* JOSEPH MILLEN.

SAME *vs.* SAME.

Suffolk. March 29, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Bills and Notes, Indorser.

In an action by the payee of a promissory note secured by a mortgage on real estate, against the indorser of the note before delivery, for a balance alleged to be due on the note after a foreclosure sale of the real estate, the facts, that the defendant paid interest on the note and collected the rents of the mortgaged property before the foreclosure sale, do not preclude him from establishing the defense that he indorsed the note for the plaintiff's accommodation and without consideration.

TWO ACTIONS OF CONTRACT, each upon a mortgage note, dated September 23, 1902, payable to the plaintiff or order and indorsed by the defendant before delivery, the declarations alleging that each note was secured by a mortgage upon real estate, and that the real estate was sold under the power of sale in the mortgage for a sum less than the amount of the note. Writs dated respectively September 14 and 17, 1908.

The defendant's answer in each case was a general denial, with averments that he indorsed the notes in question for the plaintiff's accommodation and without consideration.

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In the Superior Court the cases first were tried together before *Hardy*, J., who excluded certain evidence offered by the defendant to prove that he indorsed the notes for the plaintiff's accommodation and without consideration, and ordered the jury to return a verdict for the plaintiff in each of the cases. The defendant alleged exceptions, which were sustained by this court in a decision reported in 205 Mass. 515.

There was a new trial of the cases before *Sanderson*, J., at which the evidence was given which is described briefly in the opinion. At the close of the evidence the plaintiff asked the judge to rule "that on all the evidence presented by the defendant and his witnesses, taking into consideration the fact that the defendant said that he had collected the rents and had held himself out as the owner of this property on Harvard Street, Cambridge, [the mortgaged property] there is not sufficient evidence to go to the jury on the contention of the defendant that he is only an accommodation indorser of these several notes."

The judge refused to make this ruling, and submitted the cases to the jury, who in each of the cases returned a verdict for the defendant. The plaintiff alleged exceptions.

G. W. Reed, for the plaintiff.

D. Stoneman, A. I. Stoneman & A. G. Gould, for the defendant, submitted a brief.

DeCourcy, J. The only issue in controversy at the trial of these actions was that raised by the averments in the answers, in effect that the defendant indorsed the mortgage notes in suit before delivery for the plaintiff's accommodation and without consideration. In support of this contention the defendant related his version of the circumstances under which he indorsed the notes, and testified that he did so at the request and for the sole benefit of the plaintiff and that the plaintiff expressly stipulated that he would not hold the defendant responsible on his indorsements. In corroboration of this the defendant's wife and brother testified to statements by the plaintiff in the nature of admissions that he was to take care of the notes and release the defendant.

Doubtless the jury might well have accepted rather the plaintiff's testimony and have given controlling weight to the facts that the defendant paid interest on these notes and collected the rents of the mortgaged property before the foreclosure sale. But,

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on the evidence, whether the defendant was a mere accommodation indorser was an issue of fact for the jury; and the court rightly refused to give the ruling requested. *Nesson* v. *Millen*, 205 Mass. 515.

Exceptions overruled.

PHILIP RYAN *vs.* PATRICK F. KEANE & another.

Suffolk. March 29, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Agency, Scope of employment. *Negligence. Assault.*

In an action against the proprietor of a stable by a customer, who, while going across a wagon yard of the defendant toward a horse and wagon that he had hired from the defendant, was thrown to the ground by a collision with a stableman of the defendant who was returning to the stable after having helped to hitch the horse to the wagon, if there is evidence that, while the plaintiff was proceeding with due care, the stableman came along in a hurry, called out "Get out of my way," and immediately afterwards jostled the plaintiff or pushed him aside when there was ample unobstructed space in which to pass, the plaintiff is entitled to go to the jury both on a count alleging negligence and on a count alleging an assault, and the jury are warranted in finding that the stableman when he ran into the plaintiff was acting within the scope of his employment.

TORT for personal injuries sustained by the plaintiff on October 21, 1909, with two counts, the first alleging that the plaintiff was thrown to the ground with great violence by reason of the negligence of a servant of the defendants, and the second alleging that while the plaintiff was lawfully on the defendants' premises a servant of the defendants acting within the scope of his employment made an assault upon the plaintiff. Writ dated January 15, 1910.

In the Superior Court the case was tried before *Wait*, J. It appeared that the plaintiff on the day of the accident went to the stable of the defendants for the purpose of hiring a horse and wagon, that the defendants agreed to let the plaintiff have a horse and wagon with a driver and that after the horse had been harnessed at the stable it was taken from the stable to another

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stable or shed belonging to the defendants, a short distance away where the wagon was kept, and there was hitched to the wagon. The plaintiff's account of the accident and the facts which could have been found in regard to its cause are stated in the opinion.

At the close of the evidence the defendants asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover on the first count of his declaration.

"2. On all the evidence the plaintiff is not entitled to recover on the second count of his declaration.

"3. There is no evidence of an assault made upon the plaintiff by any servant of the defendants acting within the scope of his employment."

"5. There is no evidence that any employee of the defendants in pushing the plaintiff, was doing the work which he was directed to do by the defendants."

"8. In view of the fact that there is no evidence of a crowded condition of the stable yard or lack of room, it cannot be found that the act of an employee of the defendants in putting out his arm and pushing the plaintiff was a means or done for the purpose of performing the master's work."

The judge refused to make any of these rulings, and submitted the case to the jury with other instructions. The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendants alleged exceptions.

E. K. Arnold, (*W. B. Luther* with him,) for the defendants.

J. P. Walsh, (*C. H. Cronin* with him,) for the plaintiff.

DeCourcy, J. It was not in dispute that the plaintiff's injury was suffered through a collision with one Boylan, an employee of the defendants. As to the manner in which the two men came in contact the jury presumably believed the plaintiff's story, which was that he was crossing the yard toward the wagon which he had hired, when Boylan came along in a hurry, called out "Get out of my way," and immediately afterwards jostled the plaintiff or pushed him aside, when he had ample unobstructed space in which to pass. On these facts the plaintiff could recover under his count for an assault, or under that alleging negligence.

That Boylan was in the employ of the defendants at the time of the accident was admitted by the defendant Keane and by Boylan,

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and is apparent from the uncontradicted testimony. He had been sent by his employer to get the wagon, had helped the driver to hitch in the horse, and was hurrying back in a direct course from the wagon yard to the stable in order to resume his other routine duties as stableman. Although he had completed one of his daily tasks he remained in the service of the defendants and subject to their directions; and the relation of employer and employee, with its accompanying legal rights and obligations, continued while the employee was going from one to another portion of his day's work. *O'Brien* v. *Boston & Albany Railroad*, 138 Mass. 387.

The jury were warranted in finding that Boylan was acting within the scope of his employment at the time when he ran into the plaintiff. Probably this would not be questioned if he were driving the horse at the time and drove the wagon against the plaintiff. In the act of returning to the stable he was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if in hurrying to do his work at a busy hour in the morning he carelessly or wilfully jostled against and injured the plaintiff, the defendants are liable for his act. The evidence does not show that Boylan assaulted the plaintiff wilfully, or that he was actuated by ill will or by a desire to carry out any purpose of his own, and the judge's charge fully protected the rights of the defendants in this regard. *Howe* v. *Newmarch*, 12 Allen, 49. *Aiken* v. *Holyoke Street Railway*, 184 Mass. 269. *Brough* v. *Towle*, 187 Mass. 590. *Collins* v. *Wise*, 190 Mass. 206. *Smith* v. *Jordan, ante*, 269.

The plaintiff's due care is not questioned. The rulings requested so far as they were not embodied in the charge were rightly refused.

Exceptions overruled.

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LAURITZ F. RASMUSSEN, administrator, *vs.* AMOS H. WHIPPLE.

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Suffolk. March 29, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, In use of automobile, Due care of plaintiff's decedent. *Automobile.*

At the trial of an action against the owner of an automobile by an administrator to recover under R. L. c. 171, § 2, for the death of the plaintiff's intestate, there was evidence tending to show that the intestate was a bright, intelligent newsboy selling papers in and near a public square which was a point of transfer for passengers on various street car lines where many persons were standing or moving, that just before he was killed he had sold a paper to one of two men standing near the curb on a space reserved for street cars in the middle of a street entering the square and had started to cross the street to get a paper wanted by the other man when he was struck by the defendant's automobile, that the automobile had passed within arm's length of the two men at a rate of speed which one witness stated was from eighteen to twenty miles an hour, and that no sufficient warning or signal was given by the driver of the automobile of its approach. The defendant sat on the front seat of the automobile and the driver acted immediately under his direction. *Held*, that the questions, whether the plaintiff's intestate was in the exercise of due care when he was killed, and whether his death was caused by negligence of the defendant, were for the jury.

TORT under R. L. c. 171, § 2, to recover for the death of Albert E. F. Rasmussen on April 22, 1907. Writ dated June 15, 1907.

In the Superior Court the case was tried before *Brown*, J.

On the question of due care of the plaintiff's intestate, there was evidence tending to show that the intestate was a bright, intelligent newsboy a little over twelve years and two months of age, selling papers in Mattapan Square in Boston; that just before the accident he had been called by two men who were standing near the curb on a reserved space in the middle of Blue Hill Avenue at its entrance into the square, and had sold a paper to one of them; that the other man asked him for a paper which he did not have and he stated that he would get it and turned and started across the street to do so, when he was struck and killed by the defendant's automobile which passed within arm's reach of one of the men. There also was evidence, described in the opinion, tending to show that Mattapan Square was much frequented, that no signal was given by the automobile

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sufficient to warn the plaintiff's intestate, and that the automobile was moving at a high rate of speed. The defendant was on the front seat of the automobile beside the driver.

Other facts are stated in the opinion.

At the close of the plaintiff's evidence and again at the close of all the evidence, the defendant moved that a verdict be ordered in his favor. Both motions were denied and the case was submitted to the jury, who returned a verdict for the plaintiff in the sum of $2,000. The presiding judge refused to receive that verdict, and ordered the jury to return a verdict for the defendant and reported the case for determination by this court, judgment to be entered for the plaintiff in the sum of $2,000 if there was evidence warranting a submission of the case to the jury; and, if there was no such evidence, judgment was to be entered for the defendant.

E. B. Gibbs, for the plaintiff.

H. F. Hurlburt, Jr., for the defendant.

DeCourcy, J. The plaintiff's intestate, a boy twelve years of age, while selling papers on the easterly roadway of Blue Hill Avenue near Mattapan Square, was struck by the defendant's automobile and killed. At the time of the accident the defendant was in the automobile, and the driver acted immediately under his direction. Accordingly the gross negligence of the employee becomes immaterial, and it is conceded that the plaintiff is obliged to show only ordinary negligence on the part of the defendant or his driver. R. L. c. 171, § 2.

Near the place of the accident passengers travelling on electric cars from Brockton, Canton and Hyde Park change cars for Boston, and many people were standing or moving in the roadway as the automobile approached. There was evidence upon which the jury could find that it was being driven at a rapid rate of speed, one witness stating that it was going eighteen or twenty miles an hour, and others that it ran seventy-five or eighty feet beyond the place of the accident although it could be stopped in its own length when going at the rate of ten miles. It does not appear that the automobile was "approaching a crossing of intersecting ways, or . . . traversing a crossing or intersection of ways," and the statutory provision making a rate of eight miles an hour *prima facie* evidence of negligence does not apply. But

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it by no means follows that the driver had a license to travel at a speed of even eight miles an hour under the circumstances disclosed. Every person operating a motor vehicle on our ways must run it at a rate of speed that is "reasonable and proper, having regard to traffic and the use of the way and the safety of the public." And the jury would be warranted in finding that it was in fact negligent to run the automobile at this place and under the circumstances then existing, at a speed of eight miles or even less. The statute then in force, which was similar to the present one, did not relieve the driver of the automobile from exercising reasonable care to avoid injuring other travellers with equal rights on the public ways. Sts. 1906, c. 412, § 1; 1909, c. 534, § 16. *Trombley* v. *Stevens-Duryea Co.* 206 Mass. 516. *Commonwealth* v. *Cassidy*, 209 Mass. 24. There was testimony that the signal horn was sounded, but it was not heard by a number of witnesses to the accident, and under the circumstances the jury could infer that it was not sounded loud enough or sufficiently near to the place of the accident to give timely warning. Nor is it contended that even the loud blowing of a horn would give to the motor vehicle any exclusive right of way, or relieve the driver from the duty of proceeding at a reasonable rate of speed and of keeping his car in control when approaching a busy thoroughfare. There was evidence for the jury of the defendant's negligence.

The due care of the deceased is a closer question. If he suddenly left the crowd of people and jumped in front of the approaching car as the defendant testified, or if he had safely crossed in sight of the machine and then suddenly ran back just in front of it, as the driver said, his conduct would be generally condemned as careless. But there were other versions of the conduct of the deceased which the jury apparently accepted and we cannot say as matter of law that they were not warranted in doing so. Taking the evidence most favorable to the plaintiff, and recognizing that the standard of care by which the conduct of his intestate must be measured is not that of an adult but of the ordinarily careful boy of twelve years, we are of opinion that the case comes within the general rule that when a minor lawfully walking in the highway is run over by a vehicle, the question of his due care, as well as that of the negligence of the driver, is usually one of fact

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for the jury. *Hennessey* v. *Taylor*, 189 Mass. 583. *McDonald* v. *Bowditch*, 201 Mass. 339. *Rogers* v. *Phillips*, 206 Mass. 308.

In accordance with the terms of the report judgment is to be entered for the plaintiff in the sum of $2,000.

So ordered.

ROBERT A. HAMMOND *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

206 F 391

Barnstable. March 29, 1912. — May 21, 1912.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DECOURCY, JJ.

Railroad, Liability for fire. *Fire. Shade Trees. Damages. Evidence. Practice, Civil.*

At the trial of an action against a railroad corporation under St. 1906, c. 463, Part II, § 247, for damages resulting from the destruction by fire alleged to have been communicated by a locomotive engine of the defendant of a two story wooden tenement house owned by the plaintiff, there was evidence tending to show that on nights previous to the burning of the plaintiff's building sparks frequently had been seen issuing from an engine of the defendant at work shifting a freight train within one hundred and fifty to one hundred and eighty feet from the tenement, that the night before there had been another fire in the vicinity, that on the night of the fire in question the engine had been working at the same place as on previous nights after half past ten o'clock for about twenty minutes while the wind was blowing toward the plaintiff's building from the engine, and that the fire was discovered about midnight on the roof of the building on the side toward the railroad track and over an unoccupied apartment. There was no evidence suggesting any other source for the fire than the defendant's locomotive engine. *Held*, that a finding for the plaintiff was warranted.

Under St. 1906, c. 463, Part II, § 247, where a building has been destroyed by fire communicated by a locomotive engine of a railroad corporation, such corporation is liable to the owner of the building for the fair value of the building at the time of the fire, and not merely for its market value when that would not indemnify the owner for his loss.

At the trial of an action against a railroad corporation under St. 1906, c. 463, Part II, § 247, for damages resulting from the burning of a wooden building and certain shade trees of the plaintiff by fire communicated by a locomotive engine of the defendant, the plaintiff was asked by his counsel without objection by the defendant, "What was the value of the real estate damaged in your opinion by the destruction of the trees?" He answered, "Well, I should say, those trees were easily worth $200 each to the place." The defendant moved that the answer be stricken out and the trial judge denied the motion. *Held*, that

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the motion properly was denied, the question having been asked without objection and the answer being responsive.

It is proper, at the trial of an action against a railroad corporation under St. 1906, c. 463, Part II, § 247, for damages resulting from the burning of a wooden building of the plaintiff by fire communicated by a locomotive engine of the defendant, to exclude questions as to the value of limited portions of the plaintiff's land before and after the fire.

TORT under St. 1906, c. 463, Part II, § 247, for damages resulting from the destruction on November 11, 1909, by fire alleged to have been communicated by a locomotive engine of the defendant, of a two story wooden tenement house and certain shade trees owned by the plaintiff on Factory Street in the town of Sandwich. Writ dated March 17, 1910.

In the Superior Court the case was heard by *Fox*, J., without a jury. It appeared that the shade trees were on the side of the street in the line of the sidewalk. The plaintiff owned land on both sides of the street.

The testimony relating to the value of the trees, referred to in the opinion, was as follows: The plaintiff was asked, "What was the value of the real estate damaged in your opinion by the destruction of the trees?" He answered, "Well, I should say, those trees were easily worth $200 each to the place." The defendant moved that the answer be stricken out. The judge denied the motion.

Other facts are stated in the opinion. The judge found for the plaintiff; and the defendant alleged exceptions.

R. A. Hopkins, for the defendant.

W. A. Morse, (*F. W. Moore* with him,) for the plaintiff.

DECOURCY, J. This is an action under St. 1906, c. 463, Part II, § 247, to recover damages for the destruction of a building and shade trees by fire alleged to have been communicated by a locomotive engine of the defendant. The trial judge found for the plaintiff and exception was taken to the refusal to rule that on all the evidence the plaintiff could not recover, and also to the admission of certain evidence.

1. From the testimony the judge could properly find that soon after midnight the fire was discovered on the roof of the plaintiff's building, on the side toward the railroad track, and over an unoccupied apartment. After half past ten that night, for about twenty minutes, an engine had been shifting a freight train on the

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track which was fifty or sixty paces from the house, and the wind was blowing from the direction of the train. On other nights sparks in large quantities were frequently seen coming from the engine on this train, and another fire had occurred in the vicinity on the night before. Nothing in the evidence suggests that the fire in question might have originated in any other way than from the locomotive. In view of these circumstances and of the other evidence in the case, it cannot be said as matter of law that the judge was not warranted in concluding that the fire was communicated by a spark from the defendant's engine. *Highland Foundry Co.* v. *New York, New Haven, & Hartford Railroad*, 199 Mass. 403.

2. The exceptions relating to evidence may be disposed of briefly. The judge rightly allowed witnesses to testify as to the fair value of the building. Under this statute the defendant is in effect an insurer, and the measure of damages is the fair or real value of the building at the time of the fire, whenever the market value would not indemnify the plaintiff for the loss which he has sustained. *Wall* v. *Platt*, 169 Mass. 398.

The record discloses no error with reference to the evidence bearing on the value of the trees. The answer of the plaintiff, that the trees were worth $200 each to the place, was responsive to a question that was asked without objection, and the judge properly refused to have the answer stricken out. The questions to the witness Clark as to the value before and after the fire of limited portions of the plaintiff's land were rightly excluded in the discretion of the judge. None of the other exceptions relating to evidence was argued and we treat them as waived.

Exceptions overruled.

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CHRISTINA A. JONES *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.
STEPHEN W. JONES *vs.* SAME.

Suffolk. November 23, 1911. — May 22, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Civil, Conduct of trial: requests and rulings, closing argument, Exceptions. *Witness.*

Where at the trial of an action of tort for personal injuries two of four witnesses who have testified for the plaintiff are shown in cross-examination statements in writing signed by them setting forth many of the facts essential to the plaintiff's case in a manner contrary to their testimony in direct examination, and they then testify that the facts as set forth in the statements in writing are true, and that, so far as their testimony in direct examination was inconsistent with the statements in writing, it was wrong, the presiding judge, because he is not obliged to select any portion of the evidence and rule upon its effect independently of the other evidence, cannot be required to rule or to instruct the jury that they would not be warranted in finding the defendant liable upon the testimony of either or of both such witnesses.

At the trial of an action against a street railway company for injuries caused by the plaintiff being thrown down by the sudden starting of a street car of the defendant from which he was alighting in a station in a subway in Boston, it appeared that an employee of another corporation operating cars in the same station procured the names of several persons as possible witnesses to the accident, and he was a witness for the defendant. While the defendant called as many witnesses as there were persons who gave their names to the employee of the other corporation, it did not appear that all the persons whose names he procured were called to testify. In his closing argument to the jury the plaintiff's counsel argued in substance that the names so procured were known to the defendant, and that the witnesses had not been called because they would have testified to facts favorable to the plaintiff. At the close of the arguments the defendant's counsel asked the judge to rule in substance that there was no evidence that the defendant had not produced every witness to the accident that it was in its power to produce. The ruling was refused. The defendant did not ask for any other instruction or ruling with regard to the plaintiff's argument. *Held,* that on the evidence the ruling asked for could not have been given; and that, although the argument of the plaintiff was not proper because the names referred to were in the possession of a stranger to the litigation so that it was no more the duty or right of the defendant than of the plaintiff to produce the witnesses in question, yet, because the defendant had not asked for any action by the trial judge with regard to such impropriety in the argument, no such question was before this court.

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TWO ACTIONS OF TORT, the first for personal injuries alleged to have been suffered by the plaintiff by reason of her having been thrown down by the starting of a street car of the defendant as she was alighting from it in the Scollay Square station of the subway in Boston; the second by the husband of the plaintiff in the first for loss sustained by reason of her injuries. Writs dated August 21, 1908.

In the Superior Court the cases were tried together before *Lawton*, J. Besides the plaintiff in the first action, three witnesses testified for the plaintiff as to the circumstances of the accident, two of whom were one Samuel A. Bergey and his wife. In cross-examination of Bergey and his wife, they were shown statements in writing signed by them which set forth several material facts relating to the accident to the plaintiff contrary to their testimony in direct examination, and they testified in substance that the statements in writing truly stated the facts and that their testimony in direct examination, wherever inconsistent with the statements in writing, was erroneous.

At the close of the evidence, the defendant asked the judge to rule as follows:

"1. As a matter of law the jury would not be warranted in finding liability on the part of the defendant upon the testimony of the witness Mr. Bergey.

"2. As a matter of law the jury would not be warranted in finding liability on the part of the defendant upon the testimony of the witness Mrs. Bergey.

"3. As a matter of law the plaintiffs would not be entitled to a verdict at your hands upon the testimony of the [witness] Mr. Bergey as he finally left his evidence.

"4. As a matter of law the plaintiffs would not be entitled to a verdict at your hands upon the testimony of the witness Mrs. Bergey as she finally left her evidence."

Other facts are stated in the opinion.

The jury found for the plaintiff in the first case in the sum of $2,000, and for the plaintiff in the second case in the sum of $150; and the defendant alleged exceptions.

D. E. Hall, for the defendant.

R. H. Sherman, for the plaintiffs.

HAMMOND, J. The presiding judge was not obliged to select

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any portion of the evidence introduced by the plaintiffs, whether given by one witness or more, and rule upon its effect independently of the other evidence bearing upon the same issue; and therefore there was no error of law in refusing the first four rulings requested by the defendant.

The counsel for the plaintiffs in his closing argument declared that the defendant had not produced certain witnesses whose names he argued were on certain slips of paper in the possession of the Boston Elevated Railway, and he argued that the failure of the defendant to produce them was evidence for the jury to consider. His language on this subject was as follows: "Now let us see what else. They got the names of three witnesses. Well, you can't complain about that. What else could they do? The starter for the Boston Elevated road took the names of the witnesses to that accident on slips of paper and sent them to the Boston Elevated Claim Department, the said department where this heel was sent. And there is, on the testimony in this case, in the office of the Boston Elevated Railroad, that bitter enemy of the Boston and Northern, as my friend would have you believe, a report of this accident from the starter in that station, with the names of witnesses which he took at that time and which my friend you know had access to so he could go and get a copy of the report. Where are those witnesses? Where are those witnesses that were on the slips that were sent to the Boston Elevated Railroad? Of course, they knew and found out who the witnesses were. Why my friend goes out of his way all over the country to bring in witnesses of all kinds and descriptions so that it has taken three days to try this case, and the important witnesses whose names are on that report, he don't dare to bring into this court room, — why? Well, there is only one reason; if those witnesses whose names were taken would say that they were there and saw that car at a standstill and that the car never started and moved a foot or an inch, those witnesses would be here, gentlemen, and you have a right to say, and it is reasonable and probable for you to say that the reason he don't bring those witnesses here whose names were taken is because they would substantiate the story of this plaintiff and they would say that this car moved and that is what caused her to be thrown back. That is the reason they are not here."

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At the close of the plaintiffs' argument the defendant requested the judge to instruct the jury that there was "no evidence that the defendant company had not produced in court all of the witnesses to the accident which were known to it and which it was its duty and within its power to produce," and subsequently, before the jury retired, it asked a ruling that there was "no evidence that we have not produced every witness to that accident that it was in our power to produce," and again, that "it appears that we have produced every witness we could here." The judge refused to give either of these instructions and the defendant excepted.

Without reciting the evidence in detail it is sufficient to say that these requests were properly refused. It could not have been ruled as matter of law that the defendant had produced every witness it could have produced, nor even that it had produced every witness whose name was on the list handed in by O'Connell * to his employer the Boston Elevated Railway Company. While it is true that the defendant called in addition to its conductor and motorman and O'Connell three other witnesses to the accident, and while it is also true that these last may have been those whose names were on O'Connell's list, the defendant had not proved that they were the same, and the question so far as material was for the jury. The rulings were properly refused.

Nevertheless the argument of the plaintiffs seems not to have been legitimate. Even if the defendant had not produced all whose names were on O'Connell's list, there was nothing to show that those absent could not have been produced as well by the plaintiffs as by the defendant. The list was in the possession of the Boston Elevated Railway Company, a stranger to the litigation. It was no more the duty or right of the defendant than of the plaintiffs to produce these witnesses. Nor was there any peculiar relation shown between them and the defendant such as to justify an unfavorable inference against the latter by failing to call them. See *McKim* v. *Foley*, 170 Mass. 426, for statement of the law on this subject.

It is to be noted however that the only exception taken by the defendant was to the refusal to give the requests above mentioned. It is now argued in its behalf that even if the presiding judge was

* A starter on duty at the station, who was called as a witness by the defendant.

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right in refusing to rule as requested, still he should have instructed the jury as to when and under what circumstances an unfavorable inference may be drawn against a party who fails to produce a witness whom it is in his power to produce. But it does not appear that the defendant made that request at the trial, and the question is not now open to it. It simply contended that there was no evidence of the existence of any such witness. There was no error in the manner in which the court dealt with that contention.

Exceptions overruled.

LOUISE E. PALMER *vs.* ALONZO B. DAVIDSON.

Worcester. January 2, 1912. — May 22, 1912.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Tree. Statute, Construction. *Evidence. Words,* "Wilfully."

R. L. c. 185, § 7, which in substance provides that one who wilfully cuts down, carries away, girdles or otherwise destroys any trees, timber, wood or underwood on the land of another without license and without good reason to believe that the land was his own or that he was authorized so to do, shall be liable to the owner in an action of tort for three times the amount of damages assessed therefor, is remedial and not penal.

At the trial of an action under R. L. c. 185, § 7, for three times the damages alleged to have been caused by the defendant wilfully cutting down trees on the plaintiff's land without license and with no good reason to believe that the land was his own or that his acts were authorized, the defendant admitted that he had cut down the trees and that he had no right to do so, and a deed was in evidence, the language of which was unambiguous and from which it appeared that the defendant had no right to cut the trees in question. The defendant offered to show that when he cut the trees he believed he had a right to do so. The evidence was excluded, and the jury were instructed in substance that the word "wilfully" was used in the statute in the sense of consciously and intentionally, "in contradistinction to casual and involuntary." *Held,* that the evidence was excluded properly and that the instructions to the jury were correct as applied to the case.

TORT under R. L. c. 185, § 7, for triple damages for wilfully cutting down trees on the plaintiff's land. Writ dated April 2, 1909.

In the Superior Court the case was tried before *Quinn,* J. The

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facts are stated in the opinion. At the close of the evidence, the defendant asked for the following rulings:

"1. The defendant is not liable to treble damages unless it appears that the trespass was wilful, in the sense that at the time he cut the lumber he had an intent to disregard the plaintiff's rights, or had in his mind the fact that he had no right to cut such lumber.

"2. If at the time of cutting the lumber, the defendant believed he had such right to cut, he is not liable for any more than the actual damage, however mistaken he may have been in such belief.

"3. The statute is in the nature of a penal law and must be construed strictly, and an intent must be proved by evidence and cannot be inferred from the doing of the act itself.

"4. Carelessness and negligence alone is not enough to render the defendant liable under this statute."

The rulings were refused. The jury found for the plaintiff in the sum of $150; and the defendant alleged exceptions.

The case was submitted on briefs.

R. B. Dodge & W. J. Taft, for the defendant.

J. S. Gould, for the plaintiff.

HAMMOND, J. This is an action brought under R. L. c. 185, § 7, whereby the plaintiff seeks to recover damages for an alleged trespass upon her land and the cutting and removing therefrom of certain trees.

1. The defendant contends that the statute is penal and accordingly should be strictly construed, while the plaintiff contends that it is remedial and should be liberally construed. The statute is plainly remedial and not penal. It gives damages only to the person whose property is injured, which in form and substance is indemnity. It is immaterial that the sum recoverable exceeds the actual injury. *Reed* v. *Northfield,* 13 Pick. 94. *Gray* v. *Bennett,* 3 Met. 522. *Mitchell* v. *Clapp,* 12 Cush. 278. *Woodgate* v. *Knatchbull,* 2 Term Rep. 154. *Stanley* v. *Wharton,* 9 Price, 301.

2. At the trial the defendant admitted that he cut the trees described in the declaration, that he had no right to cut them, that the plaintiff owned the land on which they stood at the time of the cutting and could hold the defendant answerable for the damages suffered. And the only question really in dispute is whether the damages should be single or triple.

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The only right which the defendant had to cut trees upon the plaintiff's land was derived from a certain deed from the plaintiff to him. This deed conveying the wood and timber on a certain tract of land therein described consisting of about seventy acres, contained the following clause: "Reserving and excepting, however, from the above described wood, trees and timber and from this conveyance, all the trees standing on and included in what is known as the walnut grove, situated in the northeast corner of the above described premises." It appeared that of the trees cut some were chestnut and some oak, all growing within the limits of the walnut grove named in the above mentioned clause of the deed. During the trial the defendant offered to show that at the time of the cutting he believed he had the right to cut the trees, and that he had no wilful intention of cutting trees to which he had no right. The presiding judge ruled that this evidence was inadmissible upon the ground that as matter of law there was no ambiguity in the reservation clause contained in the deed, and that under the clause the defendant had no right to cut the trees.

The evidence was rightly excluded. The defendant's deed gave him no right to cut the trees. He had in his own possession the document determining what his rights were, and he must be held to have known the terms of the deed; and he cannot now be permitted to set up his own neglect. Under such circumstances, if he intentionally cut down these trees he cut them down wilfully within the meaning of the statute. The jury were instructed in substance that if the defendant, knowing that he was upon the land of the plaintiff, cut down and carried away these trees, then he was answerable in triple damages unless he had good reason to believe that the land was his own or that he was lawfully authorized to do the acts complained of. And they were further instructed that the word "wilfully is used in the sense here of one going upon the land of another and doing it consciously, doing it intentionally," "in contradistinction to casual and involuntary."

These instructions were correct as applied to this case. The defendant knew all the facts. He went upon the land of the plaintiff knowingly, and intentionally cut down the trees. The presiding judge correctly ruled that the defendant had no reason to believe that the land was his, or that he was lawfully authorized to go

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thereon. We see no error in the manner in which the court dealt with this part of the case.

The exception to the statement in the charge that the measure of damages is the fair market value of the lumber at the time it was cut is not argued, and considering its nature we regard it as waived.

Exceptions overruled.

ARTHUR T. ROGERS *vs.* BECKER-BRAINARD MILLING MACHINE COMPANY.

Norfolk. March 6, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Contract, Implied in fact.

Where a contractor made a contract in writing with the owner of a ledge of rock by the provisions of which the contractor agreed to blast from the ledge at a certain price per cubic yard such an amount of stone as the owner might desire and the owner agreed to have one half of the rock removed before stopping the work, and the contractor removed one half of the rock and, acting as a reasonable man and under the supervision of an agent of the owner, continued at work and made preparations for the removal of the remainder of the rock, when the owner gave him notice to cease work, the contractor can recover the contract price for the rock removed, and also on a contract implied in fact the value of the work done and materials furnished in preparation for the further blasting.

CONTRACT upon an account annexed containing two items of charges, hereinafter described, for work done in drilling and blasting. Writ in the District Court of Northern Norfolk dated October 24, 1905.

On appeal to the Superior Court the case was tried before *Aiken*, C. J.

It appeared that the plaintiff and the defendant had made a contract, whose provisions, so far as material, in substance were as follows:

"The contractor [the plaintiff] agrees to blast from [a certain rock] ledge, such amount of stone as the company [the defendant] may desire; . . . to furnish all boilers, drills, tools, coal, water and materials to cover the blasts, as may be required at his own

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expense. For this work the company agrees to pay the sum of one dollar and thirty-five cents ($1.35) per cubic yard for the amount taken out of the ledge which contains 900 cubic yards. . . . The company agree to have one-half of rock removed before stopping the work, provided it is done in a satisfactory manner."

It appeared that, under the supervision of a representative of the defendant named Beale, the plaintiff in a manner satisfactory to the defendant had removed over one half of the rock ledge and had made extensive preparations for the removal of the remainder, when the defendant stopped further performance of the contract.

The first item of charge in the declaration was for the rock already taken out under the terms of the contract, and the second was for the "work done in drilling and blasting preparatory to removal of stone in remainder of ledge and prior to time work was stopped thereon including furnishing of drills etc." The defendant admitted liability under the first item, subject to a partial payment set out in the account; but it denied liability as to the second item.

At the close of the evidence the defendant asked the Chief Justice to rule that "unless the preparatory work done by the plaintiff for which he seeks to recover has been of some benefit to the defendant, the plaintiff is not entitled to damages."

The ruling was refused and the jury were instructed in substance that the plaintiff was entitled to recover for so much and only so much of the labor and materials described in the second item as he had furnished and used, acting as a reasonable man in going forward in preparation for the blasting of the remainder of the ledge before he was stopped by the defendant.

The jury found for the plaintiff for the full amount claimed; and the defendant alleged exceptions.

H. T. Richardson, for the defendant, submitted a brief.

E. C. Jenney, for the plaintiff.

DeCourcy, J. The only stipulation for payment contained in the express contract was that of "one dollar and thirty-five cents per cubic yard for the amount taken out of the ledge." When the defendant took advantage of the clause which authorized it to stop the work after one half of the rock was removed, the plaintiff had done drilling and blasting to the value of $349.92, preparatory to dislodging the remainder of the ledge. This addi-

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tional work was performed under the direction of officers of the defendant company, and especially of one Beale who was placed in charge of it by the defendant's president. It was carried on by the plaintiff in good faith, when he had no reason to believe that the defendant intended to stop the work; and the jury must have found that it was no greater in amount than he reasonably ought to have done under the circumstances, having in mind the defendant's right to terminate the contract. For labor and materials furnished under such a state of facts, which the defendant knew was not intended to be given gratuitously, the law implies an obligation to pay; and there is nothing in the written contract to exclude such an implication.

The measure of the plaintiff's damages is the fair value of the work which is additional to that covered by the contract. This is not a case where one has substantially but not fully performed an express contract and seeks to recover upon a *quantum meruit;* and cases like *Hayward* v. *Leonard,* 7 Pick. 181, cited by the defendant, are not applicable. It may be that the work in question is of little immediate value to the defendant, but this is due to its failure to give timely notice of its decision to remove only a portion of the stone, and cannot lessen the amount to which the plaintiff is entitled. *Stowe* v. *Buttrick,* 125 Mass. 449. *Fitzgerald* v. *Allen,* 128 Mass. 232. *Vickery* v. *Ritchie,* 202 Mass. 247.

Exceptions overruled.

ROBERT DONOHUE, administrator, *vs.* CITY OF NEWBURYPORT.

Essex. March 7, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Tree Warden. Municipal Corporations. Negligence, Causing death. *Way,* Public: defect in highway. *Words,* "Corporation," "Business."

A tree warden is a public officer, whose duties are established by statute, and in the performance of those duties he does not act as the servant or agent of the town or city in which he is appointed.

R. L. c. 171, § 2, as amended by St. 1907, c. 375, relating to the liability of "a person or corporation" for causing death "by his or its negligence, or by the negligence

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of his or its agents or servants while engaged in his or its business," does not apply to a town or city in connection with its ordinary municipal functions.

If a boy, who is a traveller on the sidewalk of a highway of a city, knows that the work of removing a dead tree on the edge of the opposite sidewalk is in progress and stops for a brief time to watch what is going on, when the tree for want of proper support unexpectedly falls across the street and causes his death, in an action by the administrator of his estate against the city under R. L. c. 51, § 17, it may be found that the boy was in the exercise of due care.

In an action by an administrator against a city under R. L. c. 51, § 17, for the loss of life of the plaintiff's intestate by reason of an alleged defect in a highway of the defendant consisting of a dangerous tree which fell upon the plaintiff's intestate, if there is evidence that the tree was on the edge of the sidewalk of a street of the defendant and was from two and one half to three feet in diameter at the base, that it had been struck by lightning a year or two before and was dead, that the tree warden was taking it down because it was dangerous to the travelling public, that men had been at work about the tree for a day or possibly two days before the accident, that on the day before the accident upper limbs had been sawed off and earth had been dug away from the roots, that no part of the street was roped off and no guards or signs were set up to warn the public of danger, although there was considerable travel on the street, and that the tree unexpectedly fell across the street apparently from want of support, the question, whether the tree had been a menace to travel for a sufficient length of time to constitute a reasonable notice to the defendant, is one of fact for the jury.

TORT by an administrator for causing the death of the plaintiff's intestate, a boy thirteen years of age, who, when returning from doing an errand for his mother, was killed by the falling upon him of a tree which stood on the edge of the sidewalk of Olive Street, a public way of the defendant, and was being cut down under the direction of the defendant's tree warden on October 22, 1910, the declaration containing two counts, one under R. L. c. 171, § 2, as amended by St. 1907, c. 375, alleging negligence of the tree warden, and the other under R. L. c. 51, § 17, alleging a defect in the highway of which the defendant had reasonable notice. Writ dated February 7, 1911.

In the Superior Court the case was tried before *Raymond*, J. The tree warden was appointed under the ordinance referred to in the opinion. It appeared that the tree in question was from two and one half to three feet in diameter at the base, that it had been struck by lightning a year or two before the accident and was dead and in parts rotten. The tree warden testified that his reason for taking it down was that he thought it was dangerous to the travelling public.

The tree warden and two or three of his subordinates had been working on the tree for a day or two before the accident, sawing off

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the upper limbs, digging away the earth and cutting the roots. For some time before the accident the tree was not supported by ropes or in any other way. The plaintiff's intestate was on the sidewalk on the opposite side of the street from the tree, and the tree was not expected to fall in the direction nor at the time that it did. The street was not roped off and there were no barriers or warning signs. According to the testimony of one witness the intestate when struck by the tree was walking toward his home; another witness testified that the boy had been standing there for a few minutes watching the tree. The tree unexpectedly fell across the street, striking the plaintiff's intestate who died without regaining consciousness.

The judge was of the opinion that the plaintiff was not entitled to go to the jury on either count, but submitted the case to the jury on the first count, stating to the counsel that, if the jury should find for the plaintiff, he should set the verdict aside and report the case. On the second count the judge ordered a verdict for the defendant.

On the first count the jury returned a verdict for the plaintiff in the sum of $8,000; and the judge set the verdict aside and reported the case for determination by this court. If the plaintiff was entitled to go to the jury on the first count, judgment was to be entered for him in the sum of $8,000 with interest from the date of the verdict. If the plaintiff was not entitled to go to the jury on the first count, but was entitled to go to the jury on the second count, by agreement of the parties judgment was to be entered for the plaintiff in the sum of $750 with interest from the date of the verdict. If the verdict on the first count properly was set aside and the verdict for the defendant on the second count properly was ordered, judgment was to be entered for the defendant.

R. G. Dodge, (*F. W. Johnson* with him,) for the plaintiff.

A. Withington, for the defendant.

RUGG, C. J. The plaintiff's intestate, while a traveller upon a public way in the defendant city, received mortal injuries from the fall of a tree within the way which the tree warden of the defendant was undertaking to remove.

1. He seeks to recover for the death of his intestate first under R. L. c. 171, § 2, as amended by St. 1907, c. 375. This statute permits recovery in the name of the executor or administrator in

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a sum not less than $500, nor more than $10,000, to be assessed with reference to the degree of culpability of the defendant or his or its servants or agents, "If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service." An ordinance duly adopted by the city council of the defendant before 1910 provided that the board of aldermen should annually appoint a tree warden. St. 1910, c. 363, which took effect before the injury here complained of, imposed upon tree wardens in cities the duties of tree wardens in towns. R. L. c. 53, §§ 12 and 13, as amended by St. 1908, c. 296, §§ 2, 3. These two sections confer upon the tree warden absolute power respecting the setting out, care, maintenance and removal of shade trees and the enforcement of all provisions of law for their preservation, with the exception of trees under the jurisdiction of park commissioners, but of those also upon request of the park commissioners, and with the further exception that no shade trees shall be planted within a public way without license from the selectmen or road commissioners where such authority has been vested in them. These sections define the power and authority of the tree warden respecting shade trees. They leave substantially nothing in this regard for the municipal action of such cities as have no special charter provision touching the subject.

The planting, maintenance, care and removal of shade trees in highways is a service purely public in its nature, undertaken for the common good and without any element of private gain or special advantage to the municipality. Shade trees, though not originally the subject of legislative action, have been regulated to a very considerable and increasing extent by statute in recent years, until now the whole range of municipal action respecting them is covered. There is little if anything left to local control. The definition of public shade trees is statutory, and the discretion and sound judgment of an officer appointed by local authority controls wholly their care, preservation and removal. Shade trees are not objects of utility, but rather of beauty, grace and refreshment. The motive which prompts their planting and the object to be attained by their cultivation is a general benefit. Although the expediency and extent of municipal activity is

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left to the wisdom of local instrumentalities of government and is not imperatively determined by the Legislature, the character of such beneficial work is distinctly the public weal rather than any private emolument of the city or town. It is plain that under principles firmly established in our law, the performance of these functions constitutes not private acts, but public service. A person, although appointed and paid by a city or town, performing such duties under a legislative mandate, is not a private agent or servant, but a public officer. The reasoning by which this conclusion is reached has been so often amplified and the rule is so deeply imbedded in our jurisprudence, that it is not necessary to do more than refer to a few of the leading cases: *Tindley* v. *Salem*, 137 Mass. 171. *Johnson* v. *Somerville*, 195 Mass. 370. *Postal Telegraph Cable Co.* v. *Worcester*, 202 Mass. 320. *Haley* v. *Boston*, 191 Mass. 291. *Smith* v. *Gloucester*, 201 Mass. 329. *Hathaway* v. *Everett*, 205 Mass. 246. *Harrington* v. *Worcester*, 186 Mass. 594. *Hill* v. *Boston*, 122 Mass. 344. *Bainbridge* v. *Postmaster General*, [1906] 1 K. B. 178. *Kerr* v. *Brookline*, 208 Mass. 190.

This principle of exoneration is not one of narrow or technical reasoning, but rests upon the broad foundation widely accepted in most jurisdictions, that an agency of government, while engaged upon duties imposed solely for the benefit of the public, is not liable for the negligent performance of such duty. The rule is elaborately discussed and the earlier cases collected by Knowlton, C. J., delivering the opinion in *Moynihan* v. *Todd*, 188 Mass. 301. To the same effect see *Rome* v. *Worcester*, 188 Mass. 307; *McCann* v. *Waltham*, 163 Mass. 344: *Barry* v. *Smith*, 191 Mass. 78; *Pinkerton* v. *Randolph*, 200 Mass. 24. The duty which the defendant was performing was sovereign and not private in its nature. It might have been taken over by the Commonwealth as it has been as to State highways. To hold the defendant under such a statute as this would subject it to responsibility when the State performing the same duty would be exempt. The general rule has an application wider than the law of negligence. For example, it relates to mechanics' liens, *Lessard* v. *Revere*, 171 Mass. 294, to liens for special improvements, *Worcester County* v. *Worcester*, 116 Mass. 193, and to taxation of property devoted to public uses, *Miller* v. *Fitchburg*, 180 Mass. 32.

It was held in substance, in *McCarthy* v. *Boston*, 135 Mass. 197,

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that the care of shade trees was a function of sovereignty, and that those who had charge of it were public officers, and not agents of the municipality. The same result is implied in *Washburn* v. *Easton*, 172 Mass. 525, and *Chase* v. *Lowell*, 149 Mass. 85.

The case in this respect is distinguishable from *Butman* v. *Newton*, 179 Mass. 1, *Dickinson* v. *Boston*, 188 Mass. 595, and others of their class, which hold that a municipality, undertaking through its servants and in accordance with its own definite directions the care of public ways, instead of leaving the work to be done by public officers under their official responsibility, may be liable for the neglect of such servant, because of the private interest of the municipality in keeping the public ways in such condition that no financial harm may come to it from failure in their repair. This is an exception to the general rule. It does not extend to a case like the present, because the tree warden performs only duties established by statute according to the discretion reposed in him, and not according to the direction of city officials. He is, therefore, a public officer, and not a servant or agent of the city, as those words are used in St. 1907, c. 375.

But upon broader grounds the defendant must be exonerated from liability. R. L. c. 171, § 2, as amended by St. 1907, c. 375, does not apply to municipalities. It imposes liability upon "a person or corporation." Where these two words occur together, "corporation" is the only word which can be contended to include a city or town notwithstanding R. L. c. 8, § 5, cl. 16. That is a word which in our statutes and decisions has not been used generally to include cities and towns. In a certain sense they are bodies corporate. But in common speech it is rarely that a city or town is referred to merely as a corporation. Towns in New England differ in their nature from trading, manufacturing or public service corporations, and even from municipal corporations elsewhere. They are created primarily for political purposes and the convenient administration of government. They possess few of the characteristics which distinguish the ordinary corporation. *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 129. The town was the unit of local government in Massachusetts from the earliest times.

Towns have been spoken of usually by their distinctive name, which indicated their part in government as a territorial sub-

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division rather than the fact that they are an artificial, corporate creation. They are thus referred to several times in the Constitution and its amendments. Although the Legislature always has had under the Constitution general power to provide for the establishment and dissolution of corporations, it was thought by the people not to be authorized to erect and constitute a city form of government. Hence art. 2 of the Amendments to the Constitution was adopted expressly conferring this power. *Hill* v. *Boston*, 122 Mass. 344, 354. *Warren* v. *Charlestown*, 2 Gray, 84, 101. This would not have been necessary if a city was simply a corporation. Most if not all of the city charters enacted by the Legislature pursuant to this authority do not describe the city as a mere corporation, but as a body politic and corporate or a municipal corporation. The form and arrangement of our statutes show a manifest purpose not to treat cities and towns as corporations in the ordinary sense of that word. Separate titles of the Revised Laws relate to them. R. L. "Title VII. Of Towns and Cities" comprehends chapters 25 to 34, both inclusive. Title VI, c. 20, relates to counties. Title IX, including chapters 36, 37 and 38, provides for parishes and religious societies and libraries. "Title XV. Of Corporations" comprehends chapters 109 to 126, both inclusive, and relates to all kinds of general corporations, both public and private, charitable and business, those clothed with the power of exercising eminent domain, as well as those having the most limited powers. A similar division has existed in the Revised, General and Public Statutes.

Even where cities and towns are authorized to enter the field of business enterprises, like the manufacture of gas and electricity, they do it not under the laws relating to private corporations set forth in R. L. c. 121, but under the special provisions contained in R. L. c. 34. Whether a city or town which has undertaken gas, electric lighting or water business would be liable for death occasioned in the conduct of it under this statute it is not necessary to determine here. See R. L. c. 25, § 31; c. 34, § 28.

When the Legislature has intended to include both municipal and business corporations within the scope of a statute, generally it has used plain words to that effect. For example, in St. 1909, c. 136, the language is "A county, city or town or any corporation." See also R. L. c. 51, §§ 17 to 21, both inclusive; St. 1909, c. 233.

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The employers' liability act applies to municipalities not because they are corporations, but because they are employers, which is the significant word in that statute. *Coughlan* v. *Cambridge*, 166 Mass. 268, 276.

The decisions of this court, whenever the question has arisen, have held that a municipality commonly was not included within the word "corporation." *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 187. *Rumford School District* v. *Wood*, 13 Mass. 193. Often it is referred to as a *quasi* corporation. *Whitney* v. *Stow*, 111 Mass. 368. *Prout* v. *Pittsfield Fire District*, 154 Mass. 450. *Bishop* v. *North Adams Fire District*, 167 Mass. 364, 369. This is sharply brought out in *Linehan* v. *Cambridge*, 109 Mass. 212, where it was held that the word "corporation," as used in the statute as to interrogatories to parties to actions, did not include cities and towns. R. L. c. 173, § 61. See St. 1912, c. 276. A doubt was intimated in *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, 18, whether the present statute applied to cities and towns. The conclusion that "corporation" as used in statutes relating to trustee process included cities and towns was reached in *Adams* v. *Tyler*, 121 Mass. 380, purely upon historical considerations arising from a recommendation of commissioners on Revision of the Statutes rejected by the Legislature.

Generally it has been held that the word "corporation" does not include a municipal corporation. *Sherman County* v. *Simons*, 109 U. S. 735, 740. *Switzer* v. *Wellington*, 40 Kans. 250. *Brown* v. *Gates*, 15 W. Va. 131, 160. *Memphis* v. *Laski*, 9 Heisk. 511. *Iowa Electic Medical College Association* v. *Schrader*, 87 Iowa, 659. *State* v. *District of Narragansett*, 16 R. I. 424. *Owners of Lands* v. *People*, 113 Ill. 296, 314. *McDougal* v. *Hennepin County*, 4 Minn. 184. See *Hughes* v. *Auburn*, 161 N. Y. 96, 107. Most of the cases from other jurisdictions relied upon by the plaintiff are distinguishable either in the phrase or collocation of the statute from the one here under consideration. But if they are not plainly different in every respect we are not disposed to follow them.*

* *Anniston* v. *Ivey*, 151 Ala. 392. *Merkle* v. *Bennington*, 58 Mich. 156. *Keever* v. *Mankato*, 113 Minn. 55. *Davis* v. *Rumney*, 66 N. H. 331. *Murphy* v. *Board of Chosen Freeholders*, 28 Vroom, 245. *McCaughey* v. *Tripp*, 12 R. I. 449.

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It cannot be presumed that the Legislature would intend to work such a radical change in the principles of liability for the performance of public benefit as would be wrought by construing the word "corporation" to include cities and towns, without the use of plain and unequivocal language. A further confirmation of this view is found in the statute which has existed for more than a century imposing liability upon a municipality for death resulting to a traveller upon a public way from its defective condition. R. L. c. 51, § 17. The result is that on all grounds the plaintiff fails to make out a case on his first count.

2. The second count of the plaintiff's declaration is founded on R. L. c. 51, § 17, which gives a remedy for loss of life occasioned by reason of a defect or want of repair upon a public way.

The deceased was a traveller, and may have been found to have been in the exercise of due care. That he knew the work of removing the trees was in progress is not decisive against him, *Thompson* v. *Bolton*, 197 Mass. 311, nor that he may have paused for a brief time to watch what was going on. *Gulline* v. *Lowell*, 144 Mass. 491.

The difficult question is whether the defendant had the previous reasonable notice of the defective condition of the tree which is a prerequisite to its liability. There was evidence, from which it might have been found that the tree was from two and one half to three feet in diameter near its base and was dead, having been struck by lightning a year or two before; that parts of it were rotten; that some of the branches were in such condition that they might have blown off in a high wind; that men had been at work about the tree one or possibly two days before the accident; on the day before upper limbs had been sawed off, and earth had been dug away from its roots; that no part of the street was roped off, and no guards or signs were set up to warn the public of danger; that there was considerable travel on the street, and there were several houses on it and a store nearby. The tree warden of the defendant testified without objection that he thought it was dangerous to the travelling public and that was the reason he was taking it down. The tree fell apparently because of lack of support about ten o'clock in the forenoon. We incline to the view that under all these circumstances it was a question of fact whether the tree had been a menace to travel

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for a sufficient length of time to constitute a reasonable notice to the defendant. *Wright* v. *Chelsea*, 207 Mass. 460. *Burditt* v. *Winchester*, 205 Mass. 493. *Comerford* v. *Boston*, 187 Mass. 564, 566. *Stoddard* v. *Winchester*, 154 Mass. 149. *Pratt* v. *Cohasset*, 177 Mass. 488. It follows that the plaintiff had a right to go to the jury upon his second count.

In accordance with the terms of the report, let the entry be

Judgment for the plaintiff in the sum of $750 with interest from the date of the verdict.

MICHAEL FLAHERTY *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

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Suffolk. March 7, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Railroad, Employer's liability.

In an action against a railroad corporation by a car cleaner for personal injuries sustained when in the employ of the defendant, there was evidence that the plaintiff in the course of his duty was returning to a car yard of the defendant and was walking close to a fence by the side of a spur track leading to the car yard where there was not room for him to walk or stand without being struck by a train coming on that track, that for years this route had been used by the employees of the defendant and that it was the only way permitted by the foreman for reaching the yard from the place where the plaintiff had been at work, that it was customary for the rear brakeman of a train that was being backed down to the yard to blow a whistle on the air hose as a warning signal at this place and to look out for persons on and near this track, that the plaintiff relied somewhat on this custom and that no signal was sounded, that the plaintiff also looked behind him a number of times during the minute and a half that he was on or near this track, but saw no train, and that he was struck from behind by a train of empty cars that was being backed down to the yard under the control of a rear brakeman of the defendant, who was negligent both in failing to give the customary signal and in failing to stop the train by the air brakes. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, as also was the question whether the plaintiff appreciated the risk and voluntarily assumed it.

A car cleaner in the employ of a railroad corporation does not by his contract of employment assume the risk of an injury due to the negligence of a rear brake-

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man of the railroad corporation in failing to give a customary signal of the approach of a train of empty cars in his control on a spur track leading to a car yard and his further negligence in failing to stop the train.

TORT for personal injuries sustained, when the plaintiff was in the employ of the defendant as a car cleaner, on December 7, 1906, alleged to have been caused by the negligence of a person in the service of the defendant in charge or control of a train. Writ dated May 8, 1907.

The answer was a general denial.

In the Superior Court the case was tried before *Brown*, J. The material facts are stated in the opinion. The accident happened at shortly after five o'clock in the afternoon. The fence, mentioned in the opinion, close to which the plaintiff was walking, was so near the track leading to the car yard that there was not room enough for a person to walk or to stand between it and the track without being struck by a train coming on that track, and the plaintiff testified that if he saw a train coming behind him his only way to escape it was to get over upon the main track.

At the close of the evidence the judge ordered a verdict for the defendant, and reported the case for determination by this court, with a stipulation of the parties that, if the ordering of the verdict for the defendant was wrong, judgment should be entered for the plaintiff in the sum of $2,500; otherwise, that judgment should be entered for the defendant upon the verdict.

James J. McCarthy, for the plaintiff.

G. L. Mayberry, (*J. M. Gibbs* with him,) for the defendant.

DECOURCY, J. The plaintiff was walking from the Trinity Place station to the Huntington Avenue car yard of the defendant, for the purpose of returning his tools and delivering the usual written statement of his day's work. Along the middle of the railroad location there was a fence; and north of this was the main track for outbound passenger trains and a spur track which led into the yard. Flaherty was walking alongside this spur track and close to a fence that formed the northerly bound of the location when he was struck from behind by a train of empty cars that was backing out from the South Station to the yard.

The path travelled by the plaintiff was a dangerous one, but we

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cannot say as matter of law that he was not exercising due care. For years this route had been used commonly and openly by employees of the defendant, "bosses, foremen, brakemen, conductors, car cleaners, men and women." And upon the plaintiff's testimony this was the only permissible way to reach the yards, as his foreman had forbidden him to go around by the street and told him to go down the track. Further there was ample evidence that it was customary for the rear brakeman on trains that were being backed down to the yards to blow the whistle on the air hose as a warning signal at this place, and to look out for persons on or near the track. The plaintiff said that he knew of and relied somewhat upon this custom and that no signal was sounded from the train that injured him. According to his testimony he not only listened for the usual whistle or bell of any approaching train, but took the further precaution of looking behind him a number of times during the minute and a half that he was on or near the track. The main track would have been a still more dangerous place for him on account of the frequency of passenger trains. We are of opinion that it was for the jury to determine the weight to be given to this evidence and to pass upon the due care of the plaintiff. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 199 Mass. 522. *Santore* v. *New York Central & Hudson River Railroad,* 203 Mass. 437. *Anthony* v. *New York, New Haven, & Hartford Railroad,* 208 Mass. 11.

The evidence would warrant a finding that the injury was due to the negligence of one Whalen, the rear brakeman on train 10. He was in charge or control of the train, which he could slow up or stop by applying the air brakes; and for his negligence the defendant is responsible. R. L. c. 106, § 71. He admittedly knew that employees were likely to be on and near the track at the place of the accident, and especially at that hour; he testified that it was his business "to look out for anybody or signals, everything;" that his hand was on the valve and by turning it he could check or stop the train which was entirely within his control; and that a man on the rear platform would have no difficulty in seeing a person who was walking near the fence. The place was well lighted, yet for some unexplained reason Whalen failed to see the plaintiff before the accident. Upon the evidence the jury would be warranted in finding that the accident was due to his failure to stop

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the train before the plaintiff was injured. *Steffe* v. *Old Colony Railroad*, 156 Mass. 262. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 199 Mass. 522.

The defense of assumption of risk is not set up in the answer, but counsel have raised no question of pleading. Under the doctrine of contractual assumption of risk the defendant owed no legal duty to the plaintiff to protect him from the dangers that were incidental to his employment as ordinarily and carefully conducted. Here, however, it could be found that the plaintiff's injury was due to a risk that was not usual or ordinary, namely, the approach of a train without the customary warning signal, and the subsequent negligent failure to stop the train. The negligence of the defendant or of those for whose carelessness it is legally responsible, is not assumed by the plaintiff. To rule that the defendant owed the plaintiff no protection from the consequences of its own neglect would be to nullify the statutory provision which expressly imposed upon the defendant a duty towards the plaintiff. Here, as generally, it is for the jury to say whether the plaintiff appreciated the risk of the danger from which he suffered and voluntarily assumed it. And the burden of sustaining this issue is upon the defendant. *Leary* v. *William G. Webber Co.* 210 Mass. 68.

In accordance with the report, judgment is to be entered for the plaintiff in the sum of $2,500.

So ordered.

THOMAS L. HARRIS *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 8, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Railroad. Way, Public: defect in highway. *Words*, "Traveller."

A railroad corporation, which under R. L. c. 111, § 129, is bound to keep in repair the portion of a public way crossed by its road at grade, is not liable under the highway act for injuries to a boy caused by his foot catching between one of the rails of the track and the planking at such a crossing when he was running a race with his companions, even if the edge of the planking next the rail was

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so worn as to constitute a defect in the highway, because the boy in using the way simply as a playground was not a traveller within the meaning of the word as established by the decisions of this court.

TORT under R. L. c. 51, § 18, c. 111, § 129, by a boy, seven years of age when injured, for injuries sustained on October 25, 1901, at the grade crossing of the defendant's track with Railroad Street in the town of Wakefield, alleged to have been caused by a defect in the portion of the highway which the defendant was by law obliged to repair. Writ dated February 5, 1902.

In the Superior Court the case was tried before *Schofield*, J. The material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which after the resignation of *Schofield*, J., were allowed by *Hardy*, J.

The case was submitted on briefs.

S. K. Hamilton & T. Eaton, for the plaintiff.

A. R. Tisdale, for the defendant.

DECOURCY, J. By statute there was imposed upon the defendant the duty of keeping in repair the portion of Railroad Street that was crossed by the railroad at grade. R. L. c. 111, § 129. *Scanlan* v. *Boston*, 140 Mass. 84. *Mack* v. *Boston & Albany Railroad*, 164 Mass. 393.

It being agreed that the defendant was operating a railroad across the street lawfully, its tracks, when properly constructed and maintained, cannot be a defect for which it is liable, even though they may be obstacles to travel. *Lawrence* v. *New Bedford*, 160 Mass. 227. *Fowler* v. *Gardner*, 169 Mass. 505. There was evidence that at the place of the accident the space between the rail and the planking was from two and a half to three inches, and that there was "a sort of cutting along the edge of the planking, a kind of slivering, as if the flange of a wheel might have slipped along and worn the planking off." This evidence, although slight, made it a question of fact for the jury to decide whether there was a defect in the way. *Gillett* v. *Western Railroad*, 8 Allen, 560.

The defendant, however, was not obliged to keep this portion of the way in repair, except for the purposes of travel; and the plaintiff was not a traveller within the established meaning of that word in the statute creating liability for defects in highways.

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He was using the way simply as a playground and was racing in competition with his companions when his foot was caught between the rail and the planking. However we might decide if the question were an open one, the case is governed by *Blodgett* v. *Boston*, 8 Allen, 237, and *Tighe* v. *Lowell*, 119 Mass. 472; and the presiding judge rightly directed a verdict for the defendant.

Exceptions overruled.

JULIUS RAGOLSKY *vs.* HARRY NURENBERG & another.

Suffolk. March 11, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, *Res ipsa loquitur*.

In an action by a boy against his employer for injuries sustained from the bursting of a bottle while the plaintiff was operating a bottling machine of the defendant, it appeared that the breaking of bottles was expected to occur, and the plaintiff contended that his injury was due to the defective working of doors of the machine which should have closed automatically to prevent the fragments of glass from reaching him. Twice before the day of the accident the plaintiff had worked on the machine and it then was in good order and there was no evidence that it was used by any one else before the accident. There was no evidence of previous trouble in regard to the closing of the doors or of any defect in their condition or adjustment or of any lack of proper inspection. *Held*, that, assuming that the failure of the doors to close had caused the plaintiff's injury and was due to some defect in the mechanism that controlled them, there was no evidence that the defendant was negligent in failing to anticipate that the doors would not close as usual and that the plaintiff was not entitled to go to the jury.

DECOURCY, J. The injury to the plaintiff's eye resulted from the bursting of a bottle while he was working for the defendants upon a machine for bottling tonics. The only evidence in the case was the testimony of the plaintiff. In consequence of his imperfect command of the English language and the fact that some of his explanations were indicated to the jury by motions of the hands and appear in the exceptions only by the word "indicating," which conveys no meaning to us, the meagre record fails to dis-

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close an adequate description of the machine and of important details connected with the accident. Apparently the operator first placed an empty bottle in the machine and pressed his foot upon a treadle, whereupon two iron doors closed automatically by means of one or more springs and partially or wholly enclosed the bottle. He then pressed down a lever handle, the water and syrup flowed into the bottle, and a further pressure upon the handle closed the bottle and inserted a stopper. The motions followed each other in quick succession, the whole operation requiring only two or three seconds.

The plaintiff was sixteen years of age, had been in the employ of the defendants two or three weeks, and was taught to operate the three bottling machines in the shop. Twice before the day of the accident he worked on the machine in question. The last time it worked all right; and there was no evidence that it was used by any one else in the meantime. During the forenoon of the day of the accident he worked on one of the other machines, and after noon was filling the first bottle on this one when the injury occurred. The entire testimony as to the happening of the injury is as follows: "Q. Will you please tell us what happened while you were filling? A. As soon as I put in the bottle in the machine I began to let the water go, and she was full, and as soon as I began to close it up she bursts right in my eye. . . .—Q. Well do you know how it happened that the bottle broke that afternoon? A. Well I was filling the bottle and it broke, that is all I know."

The only other testimony that bears upon the issue of negligence is the following conversation between the plaintiff and one of the defendants after the accident: "I have told him how it was so. 'Well,' he says, 'That is a little — it only costs us thirty-five cents a spring to that door — it is so close —'."

We have here the mere occurrence of an accident. To infer from that alone that it was caused by the negligence of the defendants would be to assume the very issue which the plaintiff is obliged to prove. This is not a case of *res ipsa loquitur*, where we can say that in the ordinary course of things such an accident could not happen unless from careless construction, inspection or use attributable to the employer. The plaintiff's claim is not based on the mere breaking of the bottle; he knew from experience that this was likely to occur, and so far as the evidence shows it

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could not be prevented. *Lehman* v. *Van Nostrand,* 165 Mass. 233. *Fuller* v. *New York, New Haven, & Hartford Railroad,* 175 Mass. 424. His contention is that the doors were designed to prevent the fragments of glass from reaching him, and that the injury was due to the failure of the doors to close. But even if we assume that the doors remained open and that the glass which occasioned the harm came through the opening, and infer that the failure of the doors to close was due to some defect in the mechanism that controlled them — all of which is somewhat conjectural — the plaintiff fails to show that the defendants were negligent in failing to anticipate that the doors would not close as usual. There was no evidence of previous trouble in their operation, none of defect in their condition or adjustment, none of lack of proper inspection. Upon the evidence taken most favorably for the plaintiff we have for the first time a defective operation of a suitable machine, with no circumstances shown which indicate negligence on the part of the defendants in their failure to foresee that the doors would not close as usual.

As the plaintiff has failed to show that the injury was due to negligence on the part of the defendants, it becomes unnecessary for us to consider the issues of his due care and assumption of risk.

The trial judge* directed a verdict for the defendants upon this evidence; and under the report judgment is to be entered upon the verdict.

So ordered.

L. S. Thierry, for the plaintiff.

D. Stoneman, (*A. G. Gould* with him,) for the defendants.

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* *Pratt, J.*

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COMMONWEALTH *vs.* ALLEN H. MACKENZIE.

Suffolk. March 11, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Practice, Criminal, Trial of one defendant indicted jointly with another, Conduct of trial. *Evidence*, Admissions and confessions, Statements of co-conspirator. *Constitutional Law*, Right of one accused of crime not to incriminate himself. *Conspiracy*, Trial of one defendant alone, Statements of co-conspirator.

An indictment against two defendants for conspiracy to steal money from a certain person can be tried against one of the defendants alone in the absence of his alleged co-conspirator in parts unknown.

At the trial of an indictment for conspiracy to steal money from a certain person the testimony of the defendant, given before the grand jury when the transactions on which the indictment was based were the subject of inquiry, may be put in evidence against him, if the presiding judge fully guards the defendant's rights and instructs the jury not to consider the evidence unless they are satisfied that the statements were made by the defendant voluntarily and after he had been informed that he was not obliged to furnish any evidence tending to incriminate himself.

At the trial of one of two defendants indicted jointly for conspiracy to steal money from a certain person, the other defendant being absent in parts unknown, after evidence of the existence of an unlawful conspiracy between the two defendants has been presented, the presiding judge may admit in evidence statements of the absent defendant not made in the presence of the defendant on trial, if he instructs the jury that in determining the preliminary question whether a conspiracy existed they must consider only the acts and declarations of the defendant on trial, and must not consider the alleged declarations of the absent defendant as against the defendant on trial unless and until the evidence of the conduct and statements of the defendant on trial satisfy them that he was engaged in an unlawful conspiracy with the absent defendant.

At the trial of an indictment for conspiracy as in other trials the order in which evidence shall be allowed to be introduced is within the discretion of the presiding judge.

INDICTMENT, found and returned on March 11, 1911, charging that William Marrison, otherwise called William F. Pray, and Allen H. MacKenzie on March 1, 1911, at Boston conspired together to steal the property, money, goods and chattels of Wesley A. Gove.

On motion of the defendant a bill of specifications was filed, which set forth that between January 1 and March 15, 1911, at Boston "the defendants conspired together to defraud one Wesley

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A. Gove of a large sum of money by means of a certificate for one hundred shares of the stock of the Northern Pacific Railroad Company, and which certificate was worthless."

In the Superior Court the case was tried before *Chase*, J., against the defendant MacKenzie alone, hereinafter called the defendant. Before the jury were empanelled the defendant moved that the indictment be dismissed, alleging the following ground: "Where two defendants are indicted both of whom are named, for conspiracy, one defendant cannot be tried in the absence of the other as a verdict for or against one is a verdict for or against the other and in order to try a defendant he must be present in court." The judge denied the motion.

The testimony given by the defendant before the grand jury, which is referred to in the opinion, was testified to by the official stenographer who took it down. It related to the transactions on which the indictment was based. It appeared from the stenographer's statement that before the defendant was sworn as a witness the assistant district attorney made to him the following statement: "I want to apprise you of your rights here in the grand jury room. The grand jury, of course, may indict you or anybody else. They may indict me or anybody they please on your own statements or on my statement, whether they receive it here in evidence or whether they receive it independently, and any statement that you may make here, if the grand jury see fit, they may indict. You may refuse to answer any question that is put to you on the ground that it has a tendency to incriminate you. If you do refuse to answer on that ground you must state so. Now, do you fully understand your rights, or do you wish me to explain it any more fully?" The defendant answered, "I think I do." The instruction of the judge in regard to this matter is described in the opinion.

The circumstances attending the admission of the statements of Marrison made in the absence of the defendant, to which the defendant excepted, are described in the opinion.

The first and the sixth rulings requested by the defendant and refused by the judge, which are referred to in the opinion, were as follows:

"1. Upon all the evidence in the above entitled case a verdict should be ordered of 'Not guilty.'"

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"6. If the jury find that the certificate of Northern Pacific stock had a value of $100 or more, then the certificate was not worthless and the indictment has not been sustained."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. M. Schwarzenberg, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth, submitted a brief.

DeCourcy, J. 1. In the absence of the alleged co-conspirator Marrison, whose whereabouts was unknown to the prosecution, the trial proceeded against the defendant alone. The motion to dismiss the indictment on that ground was rightly denied. *People* v. *Richards*, 67 Cal. 412. *State* v. *Buchanan*, 5 H. & J. 500. *Rex* v. *Kinnersley*, 1 Stra. 193. *Regina* v. *Ahearne*, 6 Cox C. C. 6. 1 Russ. Crimes, (7th ed.) 147, 148, notes.

2. The defendant's testimony before the grand jury was properly admitted at the trial. The judge fully guarded the defendant's legal rights, and instructed the jury not to consider this evidence unless they were satisfied that the statements were made by the defendant voluntarily and after he had been informed that he was not obliged to furnish any evidence tending to incriminate himself. This unrestricted constitutional guaranty against incriminating testimony by one accused of crime was established when a defendant was not allowed to be a witness in his own behalf, and need not be extended under present day conditions. Certainly the fact that statements freely made by the defendant under oath tend to show that he conspired to steal the property of another is no reason for excluding them in a proceeding instituted to investigate the truth as to an alleged crime and to safeguard the interests of the community. *Commonwealth* v. *Mead*, 12 Gray, 167. *Higgins* v. *State*, 157 Ind. 57. *State* v. *Robinson*, 32 Ore. 43.

3. No error is shown in the admission of statements made by the alleged co-conspirator Marrison in the absence of the defendant. Before this testimony was introduced the prosecution had offered the defendant's testimony before the grand jury, which, presumably, satisfied the trial judge that a *prima facie* case of unlawful conspiracy had been made out. Further, in his charge the judge clearly and fully instructed the jury that in determining the preliminary question whether a conspiracy existed, they must con-

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sider the acts and declarations of the defendant alone; and he carefully cautioned them not to consider the alleged declarations of Marrison as against the defendant unless and until the evidence of the defendant's own conduct and statements satisfied them that he was engaged in a common purpose with the alleged co-conspirator. The jury were warranted in finding that a criminal conspiracy was thus established, and in then considering the declarations of Marrison, made in furtherance of the common purpose, to be in legal effect the statements of his absent partner. So far as this evidence was competent against the defendant, the order of introducing it was within the discretion of the presiding judge. *Commonwealth* v. *Smith*, 163 Mass. 411, 418. *Commonwealth* v. *Rogers*, 181 Mass. 184, 193. *Commonwealth* v. *Stuart*, 207 Mass. 563.

4. There is some doubt as to whether the defendant intended to waive his exception to the judge's refusal to give the rulings requested; but we have preferred to consider them. The first could not be given, as there was ample evidence that the defendant and Marrison conspired together to defraud Wesley A. Gove of more than $9,000 by means of a substantially worthless stock certificate. The sixth request suggests what at most would be an immaterial variance. There was no allegation of value in the indictment and none was necessary in the specifications. As matter of fact the Northern Pacific Railroad Company had no assets and its stock was not listed: whereas the Northern Pacific Railway Company's stock, which this was falsely represented to be, was wholly different in kind and quality and had a market value of about $118 a share. R. L. c. 218, § 35. *State* v. *Knowlton*, 11 Wash. 512. The remaining requests deal with questions of fact and their determination was for the jury.

Exceptions overruled.

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ELLA M. POPE, executrix, *vs.* CURTIS ABBOTT.

Suffolk. March 12, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant, Liability for rent, Surrender.

Where, in a lease of a room in a building for five years, it is provided that the lessee may have the right to surrender the premises at the end of three years by giving to the lessor on or before a certain date a notice in writing of his intention to do so, no surrender of the premises is effected unless, besides giving the notice as required, the lessee ceases to occupy the premises at the end of the three years, and, if he continues to occupy the premises after that time, the lease remains in force, and he cannot avoid it by giving a notice to quit as a tenant at will or by abandoning the premises.

CONTRACT for rent for the period from October 1, 1909, to January 13, 1910, alleged to be due under a lease in writing of a room in the Tremont Building in Boston. Writ in the Municipal Court of the City of Boston dated February 18, 1910.

The lessors assigned their rights under the lease to Eugene A. Pope, who originally was the plaintiff in this action. On his death the executrix of his will was admitted as plaintiff.

On appeal to the Superior Court, the case was heard by *Fessenden*, J., without a jury. It appeared that the substance of the provisions of the lease as to its term and the payment of rent was as follows:

"To have and to hold the premises hereby demised unto the lessee, for the term of five years beginning with the first day of April in the year nineteen hundred five. Reserving however, to said lessee the right to surrender said premises on April 1, 1908, by giving said lessors notice in writing of his intention so to do on or before Jan. 1, 1908, and fulfilling all his covenants and agreements herein contained up to the date of surrender.

"Yielding and paying therefor the yearly rent of Five hundred dollars, during the said term, by equal quarter yearly payments . . . and also at the legal determination of this lease a proportionate part of the said rent for any part of a quarter then unexpired."

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It also appeared that the defendant covenanted in the lease not to underlet without the consent in writing of the lessor. One Moffett occupied half of the premises described in the lease. There was some evidence that this was done with the knowledge of the lessors and without objection on their part.

After the defendant left the premises, Moffett paid the rent to and including October 1, 1909.

Other facts are stated in the opinion.

L. R. Eyges, (*C. Abbott* with him,) for the defendant.

C. W. Hood, for the plaintiff.

DeCourcy, J. The defendant's lease was for a term of five years from April 1, 1905, but it gave him a right to surrender the premises on April 1, 1908, by giving the lessors notice in writing on or before January 1, 1908, of his intention so to do. The notice which he gave on December 27, 1907, does not avail him, because later he failed to carry out his intention of surrendering the leased premises. Clearly his liability under the lease was not ended by his moving out about May 1, 1909; nor by the occupancy of Moffett without the consent in writing of the lessors; nor by the three months' notice to quit given on June 7, 1909. The lease was not legally terminated until the lessors' entry to take possession on January 13, 1910; and by its express terms the defendant became liable for "a proportionate part of the said rent for any part of a quarter then unexpired."

The finding of the trial judge was correct and the requests for rulings, so far as material, were rightly refused.

Exceptions overruled.

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ELLA M. POPE, executrix, *vs.* CURTIS ABBOTT.

Suffolk. March 12, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Landlord and Tenant, Liability for rent, Surrender.

Where, in a lease of a room in a building for five years, it is provided that the lessee may have the right to surrender the premises at the end of three years by giving notice in writing to the lessor on or before a certain date a notice in writing of his intention so to do so, no surrender of the premises is effected unless, besides giving the notice and doing all else as required, the lessee ceases to occupy the premises at the end of the three years, and, if he continues to occupy the premises after that time the lease remains in force, and he cannot avoid it by giving a notice to quit as a tenant at will or by abandoning the premises.

CONTRACT for rent for the period from October 1, 1909, to February 13, 1910, alleged to be due under a lease in writing of a room in the Tremont Building in Boston. Writ in the Municipal Court of the City of Boston dated February 18, 1910.

The lessors assigned their rights under the lease to Ella A. Pope, who originally was the plaintiff in this action. After her death the executrix of his will was admitted as plaintiff.

On appeal to the Superior Court, the case was heard by *Fessenden*, J., without a jury. It appeared that the substantial provisions of the lease as to its term and the payment of rent were as follows:

"To have and to hold the premises hereby demised to said lessee, for the term of five years beginning with the first day of April in the year nineteen hundred five. Reserving to the said lessee the right to surrender said premises on April 1, 1908, by giving said lessors notice in writing of his intention so to do on or before Jan. 1, 1908, and fulfilling all his covenants and agreements herein contained up to the date of surrender.

"Yielding and paying therefor the yearly rent of Five hundred dollars, during the said term, by equal quarter yearly payments . . . and also at the legal determination of this lease a proportionate part of the said rent for any part of a year unexpired."

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BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee, *vs.* MARY A. MANNING & others.

Suffolk. March 13, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Bills and Notes. Mortgage. Evidence, Presumptions and burden of proof.

From the facts alleged in the declaration in an action against the maker of a promissory note it appeared that that note and a second note signed by another person were secured by a single mortgage of real estate, that the mortgage had been foreclosed by a sale under its provisions, that the proceeds of the sale had been applied in full payment of the second note and in part payment of the note in suit, and that the plaintiff sought to recover the unpaid balance. The answer contained merely a general denial and an allegation of payment. At the trial the plaintiff introduced the note in evidence and rested. The defendant offered no evidence, and no question was raised as to the execution of the note or the consideration therefor. The judge, subject to exceptions by the defendant, ordered the jury to return a verdict for the plaintiff for the balance claimed in the declaration. *Held,* that the action of the judge was right.

CONTRACT upon a promissory note. Writ dated September 19, 1908.

In the Superior Court the case was tried before *Lawton,* J. The facts are stated in the opinion. At the close of the plaintiff's case, the defendant rested and asked for the following rulings:

"1. That the plaintiff cannot recover on all the evidence.

"2. That the note sued on refers to a mortgage that secures the note and the burden of proof is upon the plaintiff to produce the mortgage to show whether it has been partially or wholly discharged, as determining whether anything is due on the note.

"3. That the burden of proof is upon the plaintiff to show that due notice under the terms of the mortgage was given to each defendant or it cannot recover.

"4. The discharge of the mortgage carries with it payment of the note secured thereby, and the burden of proof is upon the plaintiff to show that the mortgage has not been discharged and the mortgage not yet paid.

"5. The discharge of the mortgage and the cancellation of the

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note are not independent transactions, although perfected in different ways peculiar to each other.

"6. If the plaintiff has not offered evidence to show it has lived up to the terms and covenants of the mortgage to be performed on its part it cannot recover against these defendants."

"8. That the mortgage and not the note is the gist of the right of action for breach of condition or conditions of said mortgage, and the conditions and terms of the mortgage must be observed and lived up to by the mortgagee before a right of action begins on the note for a breach or breaches of conditions on the part of the mortgagor, and evidence of the observance of these conditions must be offered affirmatively by the plaintiff or it cannot recover in this action."

The rulings were refused; and a verdict was ordered for the plaintiff. The defendants alleged exceptions.

The case was submitted on briefs.

A. J. Connell, for the defendants.

C. K. Cobb, for the plaintiff.

DECOURCY, J. This is an action against three of the five makers of a joint and several note for $14,400, which was long overdue. At the trial the plaintiff offered in evidence the note declared on and no question was raised as to its execution, or as to the consideration therefor. The defendants had pleaded a general denial and payment, but as they introduced no evidence the plaintiff would have been entitled to a verdict for the full amount of the note and interest were it not for its admissions in the declaration crediting the defendants with a partial payment. *Whitney* v. *Clary*, 145 Mass. 156.

It is alleged in the declaration that the note in question, together with a note of the same date for $3,600 signed by one Murnane, guardian, and held by the plaintiff, were secured by a mortgage of real estate; and that upon a default in the payment of principal and interest the plaintiff foreclosed the mortgage by sale and applied upon the notes the $17,000 for which it bid in the property. The exceptions raise no question as to the application of the proceeds of the sale between the note in suit and the Murnane note. Presumably the amount was first applied to the payment in full of the latter and the balance *pro tanto* to the note in suit, as the defendants admitted that if their requests

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for rulings were refused the jury should find in favor of the plaintiff for the balance due on the note with interest, and made no objection to the rendering of the verdict for $3,490.64.

As there was no special stipulation for the application of the mortgage security, the plaintiff had a right to apply the proceeds of the foreclosure sale in full payment of the Murnane note before crediting any to the note in question; and the defendants are liable for the unpaid balance. *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270. *Draper* v. *Mann*, 117 Mass. 439. The trial judge rightly refused to give the rulings requested.

Exceptions overruled.

LEXIE MACKENZIE *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

212 - 580
215 - 296
216 - 131
216 - 308

Suffolk. March 13, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, Railroad, Due care of plaintiff's decedent.

At the trial of an action under the employers' liability act against a railroad corporation to recover for the death of a fireman upon a locomotive engine, there was evidence that the plaintiff's decedent at the time of his death was at work upon a switching engine in a yard where several tracks in turn branched from a "lead" track, and that his engine was moving on the lead track past one of the branching tracks to another; that it was his duty to take signals from the switching crew and to transmit them to the engineer when, by reason of the position of the train on a curve or the position of the crew or the construction of the engine, the engineer could not receive the signals himself; that, because of the construction of the locomotive, it sometimes was necessary for him to lean out of the cab window to get a signal, and that the conductor of the train knew this; that it was an established custom in the yard not to leave cars on the branching tracks so that they were within a certain distance of the lead track, to do so being deemed unsafe; that a car was left on one of the branching tracks in dangerous proximity to the lead track in violation of the custom; that the conductor, without making any inspection or giving any warning of the danger from the position of the car, signalled to the engineer to back the engine past the track upon which the car was, and that, within two minutes later the plaintiff's decedent was found sitting in the fireman's seat with his head outside the cab window and his skull fractured, and blood was found on the level of the cab window on the corner of the car which had just been passed. *Held*, that there was evidence of due care on the part of the plaintiff's decedent and of negligence on the part of the conductor of the train.

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One employed as a fireman on a locomotive engine of a railroad corporation does not assume as a matter of law the risk of injuries caused either by a car on a branch track in a freight yard being left in switching too near to the lead track, or by negligence of a conductor of a switching train in signalling, without inspecting the car's position or warning the fireman, for an engine to run by a car so placed.

DECOURCY, J. This is an action under the employers' liability act to recover damages for the death of Alexander W. Mackenzie, who was killed while working as fireman on a switching engine at the Beacon Park freight yard of the defendant in Boston. From the northerly main track in the yard ran what was known as a lead track; and with this latter, by means of switches, were connected various side tracks running in an easterly direction and parallel with the main line. The one nearest to the main line was number 5, and beyond this were numbers 7, 9 and 11. The accident occurred at about 10.50 in the evening of February 14, 1906, while a switching crew was making up a freight train on number 11. Cars were temporarily thrown upon the different side tracks, and then withdrawn therefrom and put on number 11 in their proper order for the trip. A box car with no brakeman riding thereon had been kicked upon number 5 and was left so near to the lead track that when the engine continued over the lead to track 7, the engine cab cleared the corner of this car by only from three to six inches. Within two minutes later the deceased was found sitting in the fireman's seat, with his head about four inches outside the cab window and his skull fractured; and blood was seen on the corner of the box car at the height of the cab window. The question presented to us is whether the case should have been submitted to the jury.*

1. That the plaintiff, the mother and next of kin of the deceased, was dependent upon his wages for support at the time of his death is not controverted by the defendant. *Mehan* v. *Lowell Electric Light Corp.* 192 Mass. 53.

2. Upon the issue of the due care of the deceased there was

* The action was brought by the mother of Mackenzie, who was his only next of kin. The case was tried in the Superior Court before *Brown*, J. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant and reported the case for determination by this court, judgment to be entered for the defendant if the ordering of the verdict was right, and, if it was wrong, for the plaintiff in the sum of $2,500.

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testimony tending to prove these facts: In the making up of a train the cars were moved in response to signal motions with a lantern, given by the conductor of the switching gang to the middleman, by him passed along to the head end man, and by the last named transmitted to the engineer. When the man giving the signal was in a position where the engineer could not see him, the fireman always took the signal and communicated it to the engineer. Such was the situation when they were going around a curve, and also when the signalling men were on the ground on the fireman's side; because the engineer's view was obstructed by the boiler butt of this engine which extended back through the cab to within eighteen inches of the back board, and was six and a half feet in height above the floor. The fireman's view in the direction the engine was backing was obstructed by the coke rack on top of the tender, which extended seven feet above the floor of the cab and projected three or four inches beyond the sides of the tender. Consequently, when watching for signals from the men who might be on his side of the track, it was necessary for Mackenzie to put his head out of the cab window. In doing so he might well rely somewhat on the conductor's observance of the established custom not to leave a car too close to an adjoining intersecting track; and in the darkness of the stormy night his failure to perceive the unusual proximity to his track of the box car, before he was brought into contact with it, was not necessarily careless. Upon the evidence the question of the plaintiff's due care was for the jury. *Lury* v. *New York, New Haven, & Hartford Railroad,* 205 Mass. 540.

As no question of pleading is raised by the report we assume that the defense of assumption of risk is open to the defendant. *Shannon* v. *Willard,* 201 Mass. 377. *Leary* v. *William G. Webber Co.* 210 Mass. 68. Clearly it could not be ruled as matter of law that the deceased assumed the risk. The doctrine applying to permanent structures in dangerous proximity to the track has no application here. *Donahue* v. *Boston & Maine Railroad,* 178 Mass. 251. And the negligence of the conductor, upon which the plaintiff relies, is not a risk assumed by the latter's contract of employment. *Murphy* v. *New York, New Haven, & Hartford Railroad,* 187 Mass. 18.

3. There was also evidence of negligence on the part of Ford,

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who was the conductor in charge of the shifting work, and for whose negligence the defendant is responsible. The accident was due to leaving the box car on track 5 in dangerous proximity to the adjoining track, when it appears that there was ample free space farther down. Ordinarily, in placing the cars the conductor is concerned only with leaving sufficient space to enable cars upon other tracks to clear without colliding. But here the conductor might be found to have known that the fireman, in performing his duty of watching for signals, would be compelled to put his head out of the cab window; and this would impose upon Ford a duty to consider Mackenzie's safety in the placing of the cars. Further it could be found that a custom prevailed in this freight yard not to leave a car where a person could reach it when standing outside the adjacent track and measuring the width of his body and the length of his arm; and the conductor testified that if the car is within that distance it is unsafe. The box car on track 5 was fully twelve inches nearer than this customary distance from the track upon which the engine was at the time of the accident, as the clear space was only from three to six inches. Nevertheless the conductor, without making any inspection or giving any warning of the danger, signalled to the engineer to back the engine upon track 7. We are of opinion that the case should have been submitted to the jury. *Dacey* v. *Old Colony Railroad,* 153 Mass. 112. *Lury* v. *New York, New Haven, & Hartford Railroad,* 205 Mass. 540. *Anthony* v. *New York, New Haven, & Hartford Railroad,* 208 Mass. 11.

This conclusion renders it unnecessary for us to consider whether there was also evidence for the jury of negligence on the part of the engineer. In accordance with the report judgment is to be entered for the plaintiff in the sum of $2,500.

So ordered.

James J. McCarthy, for the plaintiff.

G. L. Mayberry, (*J. M. Gibbs* with him,) for the defendant.

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AGNES F. MARSTON *vs.* JOSEPH F. REYNOLDS.
WILLIAM R. SAWTELLE, administrator, *vs.* SAME.

Suffolk. March 14, 15, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Agency, Existence of relation, Scope of authority. *Negligence*, Of one controlling real estate. *Evidence*, Declarations of deceased persons.

If the owner of eight houses places them in the charge of a real estate agent, who has thirty or forty houses in his charge, to care for them and to see that they are rented, and gives to him authority to advertise for tenants and to put in the window of a house when it becomes unoccupied a card on which the real estate agent's name appears as agent without the owner's name and to do whatever he chooses in the way of showing the house to possible tenants, he to deduct from what he receives as rent his disbursements as to the property and a commission of five per cent and to pay the balance to the owner, it may be found that the real estate agent bore to the owner the relation of an agent and not that of an independent contractor, and that he had authority to employ one to go with possible tenants to show them the premises, and the owner may be found liable for negligent acts of one so employed by the agent.

Where one acting on behalf of the owner of a house, in conducting over it a woman who in response to an advertisement was examining the house with a view to hiring it, failed to warn her that a platform in the basement extended only part way across it, and that at the edge of the platform a drop of eighteen or twenty inches was formed which, because of insufficient light, was not apparent, and the woman, not knowing these facts, fell from the edge of the platform and was injured, the owner can be found to be liable for the injuries so received, and the woman can be found to have been in the exercise of due care even if, had she looked, she could have seen the dangerous condition of the floor.

TWO ACTIONS OF TORT, the first for personal injuries suffered by reason of the plaintiff falling down a step in an unoccupied house of the defendant on Chandler Street in Boston, when she was examining the house in response to an advertisement offering it to let. The second action was brought by the husband of the plaintiff in the first for loss sustained by reason of her injuries, and, after the husband's death, was continued by the administrator of his estate. Writs dated December 22, 1905.

In the Superior Court the cases were tried together before *Bishop*, J.

There was evidence tending to show that an advertisement,

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signed by one Hobbs with no mention of the defendant's name and stating that the house in which the plaintiff afterwards was injured was to let, was published in a Boston newspaper, and that a sign was placed in the window of the house reading, "To Let. Fred W. Hobbs, Agent, 23 Court St." Hobbs and the defendant both were called to testify by the plaintiff. Their testimony tended to show that the defendant employed Hobbs, a real estate agent, to care for and rent eight of his houses, of which the house in question was one; that Hobbs had authority to advertise, and that he did whatever he chose to do in the way of showing the house to possible tenants; that Hobbs deducted from rent received all expenses and a "commission" of five per cent and paid the balance to the defendant, and that he employed one Otis to sweep and dust the house and to show it to possible tenants.

Otis died after the accident to the plaintiff. His widow testified that after the accident her husband talked to her and one Smiley and his wife about the accident, and told her that the place where the plaintiff fell was dark and that she made a misstep. Mrs. Smiley testified to a more detailed statement made by Otis, and a police officer, who was summoned to assist in caring for the plaintiff after her fall, testified to a statement made to him by Otis. The testimony as to the statements of Otis was admitted by the trial judge subject to exceptions by the defendant.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover in this action.

"2. If the plaintiff was standing on the platform in the basement of the premises in question looking at the furnace and turned around quickly to look at the coal bin without looking to see where she was going and stepped into space and fell and was injured, she was not in the exercise of due care and cannot recover.

"3. The defendant owed no legal duty to the plaintiff, if she entered his vacant house by invitation or on business, to place lights or guard rails at or near the steps leading from the wooden flooring to the concrete flooring in the basement of said premises if said steps were neither defective in construction nor in want of repair.

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"4. Mr. Hobbs, the real estate agent, was an independent contractor, exercising a certain degree of skill and experience and, as to the details, his acts were not under the supervision or control of the defendant, and he was therefore not such an agent and servant of the defendant as would render the defendant liable for his neglect or omission in showing the defendant's premises to a prospective tenant."

The rulings were refused. The jury found for the plaintiff in each case; and the defendant alleged exceptions, which, after the death of *Bishop*, J., were allowed by *Jenney*, J.

W. R. Bigelow, for the defendant.

R. Gallagher, (*J. A. Dennison* with him,) for the plaintiffs.

DeCourcy, J. The principal plaintiff, Agnes F. Marston, hereinafter referred to as the plaintiff, sustained the injury complained of while she was examining an unoccupied house with a view to renting it. The defendant owned the property and employed the real estate agent, Hobbs, who had thirty or forty estates in his charge, to rent and care for this and seven other houses. Whether Hobbs was an independent contractor, as assumed in the defendant's fourth request, or an agent of the defendant, as the plaintiff contended, was for the jury to say; and they were warranted by the evidence in finding the latter, and that Hobbs was acting within the scope of his employment as such agent in advertising the house to let and in employing Otis to show it to possible tenants. *Linnehan* v. *Rollins*, 137 Mass. 123. *Delory* v. *Blodgett*, 185 Mass. 126. *Bourne* v. *Whitman*, 209 Mass. 155.

As the plaintiff entered and inspected the house on the invitation of this authorized agent, the defendant was bound to keep the premises reasonably safe for use according to the invitation. It could be found that the front portion of the basement was unsafe unless properly lighted, because the platform extending across the basement for a space of five feet from the front wall was eighteen or twenty inches above the cellar bottom, and there was no guard to protect one from the danger of the unusual depression, or to call it to the notice of one unfamiliar with the premises. There was ample evidence that at the time of the accident the light in the basement was too dim to enable the plaintiff to see the edge of the platform or to perceive this dangerous difference in level; and Otis, who directed her attention to the coal bin

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in the rear of the cellar, failed to give this elderly woman any warning of the imminent danger known to him. She turned around to look at the coal bin and, as she expressed it, her right foot "went into vacancy," and she fell to the cellar floor. We are of opinion that the question of the defendant's negligence was one for the jury; and no exception was taken to the instructions under which the case was submitted. *Wright* v. *Perry*, 188 Mass. 268. *Marwedel* v. *Cook*, 154 Mass. 235.

The jury were warranted in finding that the plaintiff was in the exercise of due care. She had no reason to anticipate that there was a sudden and unmarked drop of more than a foot and a half in the level of the basement floor near where she stood; and even if she could have noticed it by looking, which is doubtful in view of the darkness, her failure to look would not necessarily be careless as matter of law. *Hendricken* v. *Meadows*, 154 Mass. 599. *Wills* v. *Taylor*, 193 Mass. 113. *Learoyd* v. *Godfrey*, 138 Mass. 315.

This disposes of all the questions raised by the requests for rulings. The declarations of Otis were competent under R. L. c. 175, § 66. From the preliminary inquiry made in the absence of the jury, it fairly may be inferred that the trial judge found that the declarations were made in good faith; and they bear internal evidence that they were made upon the personal knowledge of the declarant. *Dickinson* v. *Boston*, 188 Mass. 595. *White* v. *Boston Elevated Railway*, 208 Mass. 193.

Exceptions overruled.

EMMA J. TRIM, administratrix, *vs.* FORE RIVER SHIP BUILDING COMPANY.

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Norfolk. March 15, 1912. — May 22, 1912.

Present: RUGG, C. J., BRALEY, SHELDON, & DECOURCY, JJ.

Negligence, Employer's liability, *Res ipsa loquitur*. *Evidence*, Presumptions and burden of proof.

In an action against a ship building corporation to recover for the conscious suffering and death of an employee while working near the bottom of the boiler room hatch of an uncompleted vessel, where it appeared that the hatch was

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wholly sheathed in, forming a casing for the smoke stack open at the top, that there was no motion to the vessel, that there was a coaming around the top of the hatch on the deck eighteen inches high, and that the employee's injuries and death were caused by the falling upon him of an angle iron, but there was no evidence as to where the angle iron was before it fell, as to whose property it was or as to what caused it to fall, it was held that a verdict properly was ordered for the defendant.

In order for the plaintiff in an action for personal injuries to make out a *prima facie* case in proof of negligence of the defendant by the use of the presumption that arises from the occurrence of the accident, it must appear that the instrumentality which inflicted the injury was in the control of the defendant and subject to his use and inspection, and that the accident was one which in the ordinary experience of mankind would not have happened except from negligence of the defendant or of others for whose negligence the defendant was legally responsible.

DeCourcy, J. The plaintiff, as administratrix, seeks to recover damages for the conscious suffering and death of her husband James W. Trim, an employee of the defendant, who was injured while working near the bottom of the boiler room hatch of an uncompleted vessel. This hatchway was wholly sheathed in, forming a casing for the smoke stack, and was open at the top. Trim was killed by an angle iron, one hundred and five pounds in weight, falling on him from above.

The defendant concedes that the deceased was in the exercise of due care, and that he did not assume the risk; but it contends that the plaintiff has not sustained the burden of proving that the injury was caused by any negligence on its own part or on that of any person for whose negligence it is legally responsible. There was no testimony showing where the angle iron was before it came down. So far as the evidence disclosed it was not to be used in the defendant's work, and the general foreman testified that he had been unable to find out why it was on the vessel.

In the absence of any proof as to what caused the iron to fall upon the deceased, the plaintiff invokes the doctrine of *res ipsa loquitur*, contending that the mere occurrence of the injury raises a presumption of culpability on the part of the defendant. Undoubtedly there are instances where the proof of negligence sufficient to make out a *prima facie* case may be supplied by a presumption that arises from the occurrence of the injury. But in such cases it must appear that the instrumentality which inflicted the injury was in the control of the defendant, subject to his use

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and inspection, and also that the accident was one which in the ordinary experience of mankind would not have happened unless from the negligence of the defendant or that of others for whose negligence he is legally responsible. Where the injury might well have resulted from any one of many causes, the plaintiff, by a fair preponderance of the evidence, must exclude the operation of those causes for which the defendant is under no legal obligation. *Carter* v. *Boston & Albany Railroad*, 177 Mass. 228. *Hofnauer* v. *R. H. White Co.* 186 Mass. 47. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572.

In the present case clearly the doctrine of *res ipsa loquitur* does not apply. We have here the naked fact that the angle iron fell upon the deceased. The evidence does not show that it was the property of the defendant or under its control. We cannot assume that it would not have fallen through the hatchway except by reason of negligence on the part of the defendant, because it is equally inferable that the accident occurred without its negligence. Perhaps the most reasonable inference is that some of the three hundred and fifty fellow workmen of the deceased, through misadventure or carelessness, allowed the iron to fall from their hands, in which event the defendant would not be liable. *O'Keefe* v. *Brownell*, 156 Mass. 131. *Fay* v. *Wilmarth*, 183 Mass. 71. The suggestion that the angle iron may have been left upon the deck and have fallen through the opening is overcome by the evidence that there was no motion of the vessel, and that the coaming around the hatch on the top deck was eighteen inches high. *McCauley* v. *Norcross*, 155 Mass. 584. Without considering other conjectures, manifestly it cannot be said that the iron could not have fallen except for negligence on the part of the defendant. We are constrained to find that upon the evidence presented the trial judge* rightly directed a verdict for the defendant.

Exceptions overruled.

F. W. Dallinger, (*T. W. Cunningham* with him,) for the plaintiff.
J. Lowell & J. A. Lowell, for the defendant.

* The case was tried before *Bishop*, J., after whose death exceptions of the plaintiff were allowed by *Aiken*, C. J.

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ATTORNEY GENERAL *vs.* VINEYARD GROVE COMPANY & others.

Suffolk. December 8, 1911. — May 23, 1912.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, To enforce alleged dedication for public use. *Equity Pleading and Practice*, Master's report: exceptions, motion to recommit.

Upon an information by the Attorney General against a land company and others to compel the keeping open of a certain parcel of land extending along the sea and overlooked from a part of the lots at a seashore resort, a master found that from the year 1869 the lots were sold with reference to certain plans, and that on these plans the locus was not marked as a public park or otherwise and was separated from the lots marked on the plans by a street and by other land upon the other side of the street not laid out into house lots, that from 1869 to 1885 the proprietors, and their successor the defendant land company, built and permitted to be built about twenty buildings upon the locus extending from one end of it to the other, and that there was no time from 1870 to the filing of the bill when there had not been buildings upon it. A master found that the plaintiff had failed to prove a dedication of the locus for a public use. *Held*, that the general finding of the master that the plaintiff had failed to prove a dedication was not inconsistent with any fact found by him but on the contrary was supported by all the basic findings and must stand.

Upon an information by the Attorney General against a land company and others to compel the keeping open of a certain parcel of land, extending along a portion of the sea, where there formerly had been a fresh water pond covering more than ten acres, and overlooked from a part of the lots at a seashore resort, the plaintiff contended that by virtue of a dedication of the owners and an acceptance by the public the locus had been set apart for public use. A master made a general finding that the plaintiff had failed to prove a dedication. The master had found that when the former pond was dredged sand was dumped on the locus and on "what was originally part of the bed of the lake." The only allusion to this matter was in an exception of the plaintiff to the general finding of the master, in which one of the grounds of exception was stated to be, "because . . . it appears that the Commonwealth has title to at least a part of the land in dispute, as the former bed of a great pond, without reference to the doctrine of dedication." *Held*, that the exception to the general finding related only to the question of dedication and could not be sustained upon a ground which had no reference to that question.

An exception to a master's report in a suit in equity founded on the failure of the master to make a certain finding cannot be sustained when the evidence to which the exception relates is not before the court.

Where a suit in equity has been referred to a master under an order which directs him to report "so much of the evidence as he may deem necessary," an exception to his report on the ground of his failure to report certain evidence cannot be sustained, especially when, as in the present case, it does not appear that

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the report of such evidence was necessary to bring clearly before the court any question of law raised before the master.

A motion in a suit in equity to recommit the case to a master, for the purpose of determining a question suggested by a certain finding in the master's report but having no bearing on the principal question raised by the pleadings and tried before the master or upon the finding of the master on that question, properly may be denied by the trial judge in the exercise of his discretion.

Where a suit in equity was referred to a master under an order directing him to report "so much of the evidence as he may deem necessary" a motion to recommit the case to the master for the purpose of reporting certain testimony is addressed to the discretion of the trial judge, which here was held to have been exercised rightly.

HAMMOND, J. This is an information, brought by the Attorney General in behalf of the Commonwealth and the public, alleging in substance that by virtue of a dedication of the owners and an acceptance by the public, a certain parcel of land therein described, and in particular a certain part thereof used as a footway, has been set apart for public use; and seeking to enjoin the defendants from interfering with such use. The answers deny dedication and acceptance, and allege that the defendants have a clear title free from public use. The case is before us upon a reservation by a single justice upon the pleadings, a master's report, the plaintiff's several motions to recommit the master's report and for a final decree.

The main question is whether the land or any part of it has been set aside for public use as alleged in the bill. Before proceeding to a critical examination of this question it may be well to give a general outline of the situation as disclosed by certain facts found by the master * about which there appears to be no dispute.

The locus is about fifteen hundred feet in length, with an average width of eighty feet, and is a part of a large tract of land containing several hundred acres, formerly called Vineyard Highlands, situated in the easterly part of the town of Oak Bluffs on the island of Martha's Vineyard. The whole tract has an extended view of the ocean. The locus was formerly bounded on the east by a fresh water pond covering more than ten acres, called Lake Anthony, which was separated from the ocean by a narrow strip of beach or low land; but in the year 1902 the Commonwealth dredged the pond and cut a passage through this strip of land to the

* H. D. McLellan, Esquire.

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ocean; and ever since that time this body of water has formed a part of the ocean. To the east and southeast of Lake Anthony lies that part of the ocean known as Vineyard Sound. From a part of Vineyard Highlands the view of the ocean lies over the locus and over Lake Anthony, while from at least an equally large part of Vineyard Highlands a view of the ocean does not lie over the locus and Lake Anthony. For many years previous to 1869 certain land adjoining Vineyard Highlands had been used in the summer for camp meeting purposes. In the spring of 1869 the fee of Vineyard Highlands became vested in five persons as tenants in common. They desired to develop a summer resort, and first as individual owners and afterwards as members of a corporation to whom their interest had been conveyed (St. 1870, c. 110), they plotted much of the land into small lots and advertised the lots for sale. They made plans, the place became popular, and many lots were sold, the deeds referring to the plans. Many houses have been built, and for many years a large number of people have occupied the place as a summer resort, in addition to those who reside there all the year. In a general way it may be said that the idea of the owners in 1869 has been successfully carried out, and the scheme for a populous summer resort has been realized. The master finds that it was the intention of the promoters "to so lay out the lots as to make them attractive to prospective purchasers. One of the most important elements in the value of any lot was the view of the ocean obtainable therefrom," and "other things being equal, lots from which a good view of the ocean could be obtained sold for higher prices than lots which were afforded a poor view, or no view, of the ocean." The master further finds that "some, if not all, of the original proprietors referred to the location of the lot sought to be sold and spoke of the good view of the ocean afforded by the manner in which the lots were laid out." In a word, we are dealing with a case where the value of the land sold depended scarcely, if indeed at all, upon its adaptability for purposes of business, or even for a permanent home during the entire year, but upon its æsthetic attraction as a resting place for a short time in the summer, among which attractions a sight of the broad ocean is to many very grateful. Such is the general atmosphere surrounding the case.

The real question, however, is not what is the general nature of

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the scheme, but whether the facts found by the master, when interpreted in the light of the circumstances including the scheme, show a dedication of the locus. The master finds in substance that the representations made upon the plans were the representations of the landowners, and that the lots were sold with reference to the plans. And the plaintiff contends that the plans themselves show an intention to dedicate the locus to public use. But we are of opinion that neither of the plans indicates such an intention. The locus is not marked as a public park. It is situated some distance from the lots marked out upon the plans, and is separated from them by Commercial Avenue and other land upon the other side of the avenue not laid out into house lots. Nor is the relation of the locus to the lots marked out such as to indicate a purpose to dedicate it to the public. The case varies materially from *Attorney General* v. *Abbott*, 154 Mass. 323, cited by the plaintiff. For discussion of the principles of this branch of the law see *Boston Water Power Co.* v. *Boston*, 127 Mass. 374, and *Pearson* v. *Allen*, 151 Mass. 79, and cases cited.

The acts of the proprietors were from the first inconsistent with the view of dedication to the public. In the spring of 1870 the Wyoming House was completed and used as a boarding house for carpenters engaged in building a plank walk and wharf for the company. In the years 1870, 1871 and 1872 other structures were erected from time to time upon the locus and respectively occupied for various purposes. The master sums up his findings upon this, in the following language: "Beginning in the autumn of 1869, shortly after the original proprietors had acquired the tract of land which includes the locus, either the original proprietors, or their successors, the defendant corporation, erected, or permitted to be erected, buildings upon the locus of the character and at the times and in the places shown on the plan filed herewith, marked 'Exhibit 45.' This plan, including the figures, dates, and statements thereon, except in so far as it shows the location of the railroad, is founded upon testimony which I find to be true, and accordingly I make the same a part of this report." By an inspection of this plan it appears that from 1869 to 1885, nearly, if not quite, twenty buildings were erected upon the locus extending from one end of it to the other, many of which were still standing at the time of the hearing. And there has been no time since 1870

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when there have not been buildings thereon. Indeed the use of the locus has been entirely inconsistent with the idea that it was intended for the public use.

It is unnecessary to recite the evidence or to allude to the basic findings more in detail. The general conclusions of the master are stated as follows:

"The facts heretofore stated as found by me seem to me preliminary or basic facts, and any facts found hereafter are inferences of facts which I draw from facts already found. If, as a matter of law, the facts already found establish, or fail to establish, a dedication of the locus, this is a matter with which I have no right to deal under the order of the court hereto annexed. It is assumed that the facts already found do not present a case where the court must say, as a matter of law, either that a dedication has or has not been established, and it is assumed that the case presented herein still requires further findings of fact. If such assumption is correct the following findings are a part of this report. If such assumption is erroneous then the following findings, based as they are upon preliminary findings of fact hereinbefore made, are to be disregarded.

"I find that the plans filed herewith, marked 'Exhibits 1 and 4,' respectively, wherein it appears that the locus is not marked out into cottage lots, are as consistent with the fact that the original proprietors and the defendant corporation had not decided as to the use to which the locus should be put, as with an intention to dedicate the same to the public.

"I find that the plans filed herewith are as consistent with an intention to use the locus, bordering as it does on Commercial Avenue, for business purposes, as with an intention to dedicate the locus to the public.

"I find that the plans filed herewith, and marked 'Exhibits 1 and 4,' respectively, do not amount to the declaration of an intention of either the original proprietors or of the defendant corporation to dedicate the locus to the public.

"I find that neither the plans filed herewith, nor such plans taken in connection with the other facts hereinbefore found by me, satisfy me that either the original proprietors or the defendant corporation secretly or openly intended to dedicate the locus to the public.

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"I am unable to find an intention on the part of the owners of the locus to dedicate the same, or any part thereof, to the public, for the purposes of a view or otherwise. I cannot find that any of the defendants or their predecessors in title so conducted themselves as to lead the public to believe that a dedication of the locus, or of any part thereof, was intended. Inasmuch as I am unable to find that there has been an offer to dedicate, I cannot, of course, find an acceptance by the public of such an offer."

The question of dedication in this case is one of mixed question of law and fact. The general finding that the plaintiff had failed to prove dedication is not inconsistent with any fact found, but on the contrary is consistent with and supported by all the basic findings, and it must stand. And this general finding is applicable to the whole locus, including the footway. The plaintiff has failed to prove dedication.

One other question of substance remains. It is contended by the plaintiff that a certain portion of the locus was originally in the bed of Anthony Pond, a great pond, the title to which was in the Commonwealth; and that as to that portion the plaintiff should prevail. As to this the master finds that at the time the pond was dredged the sand "so dredged" was "dumped . . . on the locus and in part on the site of the plank walk . . . including what was originally part of the bed of the lake." He does not find to what extent the present locus covers the original bed of the pond. This question is not material to any of the exceptions to the report. The only allusion made to this matter in the exceptions to the report is found in the third exception. This third exception is to the general findings of the master which have been hereinbefore set forth, and one of the grounds of this exception is "because, upon the facts previously found by the master in his said report, it appears that the Commonwealth has title to at least a part of the land in dispute, as the former bed of a great pond, without reference to the doctrine of dedication." But the general findings relate only to the question of dedication, and it is manifest that an exception to such findings cannot be sustained upon a ground which in the language of the exception has no "reference to the doctrine of dedication."

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All of the plaintiff's exceptions * to the master's report must be overruled, the first, because the evidence relating thereto is not before us; the second, because the order of reference to him simply instructed the master to report "so much of the evidence as he may deem necessary;" and it does not appear that he deemed it necessary to report that named in this exception, nor does it appear that the report of such evidence was necessary to bring intelligently before the court any question of law raised before the master; and the third, for reasons hereinbefore stated.

The motion that the report of the master be recommitted "for the purpose of determining the boundaries of that portion of the parcel of land in dispute, the title to which is in the Commonwealth, by reason of its having been originally a part of the bed of a great pond," was rightly denied. The great question raised by the pleadings and tried before the master was not whether the Commonwealth was the proprietary owner of the locus, but whether, by reason of dedication, the public as such had acquired any interest in the locus. After the filing of the report the single justice might properly decline, in the exercise of his discretion, to recommit for the purpose named in the motion. The purpose had no bearing upon the finding of the master as to dedication. The second motion to recommit for the purpose of reporting the testimony of Gale, for reasons similar to those above stated as to the second exception, was properly overruled. The matter was within the discretion of the court. *Bakshian* v. *Hassanoff*, 186 Mass. 255. It follows also from what has been said that the plaintiff's motion for a final decree in accordance with the prayers of the bill must be denied.

In view of the contention of the plaintiff, care however should be taken to have the decree so framed as not to interfere with any right which the Commonwealth as an owner may have in and to any part of the locus which is within the limits of what was formerly the bed of the great pond.

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* The first exception was to the master's failure to find with reference to the buildings upon the locus, "that the buildings were regarded as of a temporary character and that ultimately the view would be secure." The second exception was to the failure of the master to report certain testimony of one Gale relating to the temporary character of the structure. The third exception is explained above.

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Exceptions to the master's report overruled; orders denying motions to recommit and denying the motion to strike out a part of the report affirmed; motion of the plaintiff for final decree denied.

S. R. Wrightington & H. M. Dean, (*H. M. Dean, Jr.,* with them,) for the plaintiff.

W. H. Powers, (*W. Powers* with him,) for the defendants.

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SUPPLEMENT.

Opinion of the Justices to the House of Representatives.

A statute requiring that all goods made by convict labor in a penal institution in this or any other State, before being sold in this Commonwealth, shall be marked in such a way as to indicate conspicuously the source of their manufacture, which by its terms plainly applies to interstate commerce, would be in violation of the Constitution of the United States.

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The following order was passed by the House of Representatives on April 17, 1912, and on April 26, 1912, was transmitted to the Justices of the Supreme Judicial Court. On May 3, 1912, the Justices returned the answer which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law: Would the provisions of House Bill No. 833, entitled "An Act relative to the marking of goods made in penal institutions," be constitutional and legal if enacted into law?

Ordered, That copies of the said bill be sent to the Justices of the Supreme Judicial Court.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, respectfully answer as follows the question propounded by the order of April 17, 1912, a copy of which is hereto annexed.

The bill, entitled "An Act relative to the marking of goods made in penal institutions," requires in express and unqualified terms that all goods, wares and merchandise made by convict labor in a penal institution in this or any other State, before being offered for sale in this Commonwealth, shall be branded, labelled or marked in such a way as to indicate conspicuously the source of their manufacture. Compliance with its terms is enforced by

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heavy penalties. The bill applies in unmistakable language to interstate commerce. It describes specifically the manufactures made in "any other State . . . imported, brought or introduced in the State of Massachusetts." The purpose of the bill is directly to affect interstate commerce. Its aim in this respect is emphasized by certain provisions of § 2, which obviously apply to shipments in the original package. Its terms, if complied with, would compel the branding, labelling or marking of every convict-made article brought into the Commonwealth for sale in ordinary trade.

The general principle is that under the Constitution of the United States no State can pass any law which impairs or restricts in any degree the freedom of interstate commerce. Many illustrations of its scope may be found in instances of efforts to require inspection, license to sell, registration to transport or identification by color. It has been applied to a great variety of articles, some of which, such as intoxicating liquors, had been declared by the policy of the particular State as harmful to the public safety, health and order. It has been repeatedly declared that the domain of interstate commerce is within the exclusive control of Congress and that no State under the guise of regulation, restriction or otherwise, can impose any direct burden upon it. This principle is subject to the limitation that laws passed by the several States in the exercise of the police power, general in their design and valid in their nature, will not be void because incidentally, and not primarily, they may affect interstate commerce. The bounds of the police power have not been defined. The most that courts have undertaken to do is to lay down certain broad propositions and leave each case to be decided as it arises. In a wide sense, and without undertaking to mark its limits, it may be said that the police power authorizes the enactment of statutes to promote the public health, safety and morals, and the necessary welfare of society. The present bill, in our opinion, goes beyond a lawful exercise of the police power in its direct effects upon interstate commerce. Protection of domestic laborers, manufacturers or merchants against the lawful competition from other States by means of discriminating regulations upon goods manufactured in other States, is an immediate interference with interstate commerce. The circumstance that goods made by convicts in this Commonwealth

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are included does not save the bill from primarily affecting commerce between the States. One who purchases prison-made goods in other States has a right as complete and extensive to sell them upon their own merits as he has to sell private-made goods of like nature.

Goods made by convicts are lawful subjects of commerce. This is recognized by the bill itself, which allows a free sale when marked. It is a restriction upon the freedom of trade in articles of legitimate business transactions to permit goods made in factories in other States to be sold freely in the market and to require goods like in every particular in all physical and commercial qualities, after being lawfully purchased in some other State, to be branded as "convict-made" before being offered for sale here. Plainly the purport of the bill is to affect the availability and attractiveness in the market of the branded or labelled goods. There is nothing wrong in the nature of things in prison-made goods. The employment of those convicted of crime in healthful labor is recognized as a necessity of confinement, whether its end be punitive or reformatory. The learning of useful trades has been established by statute as a part of the policy of this Commonwealth in the discipline and improvement of those paying the penalty prescribed for the commission of crime. It is a part of intelligent humanitarianism in the treatment of those under sentence. Such goods are not unsanitary or so inferior in quality that their sale would constitute a fraud on the public. This is manifest from the bill, which in § 5 excepts from its terms goods, wares and merchandise used by the Commonwealth, or by any county or municipality therein, or by any public institution. It cannot be presumed that the general public needs a protection in these respects which is denied to instrumentalities of government and to benevolent, educational, and other charitable and public institutions. Differences in grade of workmanship, if there are any, would be as apparent without branding as in like products made in private shops. The bill is wholly different from the provisions of St. 1909, c. 514, §§ 106–111, which clearly are in the interest of the public health and do not relate to interstate commerce.

The result is that we feel constrained to advise that House Bill 833, if enacted, would be unconstitutional. This is the inevitable conclusion from doctrines announced and applied in judgments of

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the United States, by which we are bound. *Hall* v. *DeCuir*, 95 U. S. 485. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465. *Leisy* v. *Hardin*, 135 U. S. 100. *Collins* v. *New Hampshire*, 171 U. S. 30. *Rearick* v. *Pennsylvania*, 203 U. S. 507. *International Text Book Co.* v. *Pigg*, 217 U. S. 91. *Dozier* v. *Alabama*, 218 U. S. 124. *Louisville & Nashville Railroad* v. *F. W. Cook Brewing Co.* 223 U. S. 70. *Plumley's case*, 156 Mass. 236. *Plumley* v. *Massachusetts*, 155 U. S. 461. It is the precise point decided in *People* v. *Hawkins*, 157 N. Y. 1; *People* v. *Raynes*, 136 App. Div. (N. Y.) 417, affirmed in 198 N. Y. 539, 622. See also *Arnold* v. *Yanders*, 56 Ohio St. 417.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

OPINION OF THE JUSTICES TO THE SENATE.

A statute providing for the payment of gratuities of $125 each to veteran soldiers and sailors still living, who volunteered in the Civil War and served in the army and navy to the credit of the Commonwealth and were honorably discharged and received no bounty, by which such gratuity is to be given as a testimonial for meritorious service for the purpose of promoting the spirit of loyalty and patriotism and not as a bounty or in equalization of bounties, would be constitutional. RUGG, C. J., separately stating his opinion, that the proposed statute would be in substance a measure for the equalization of bounties and would be unconstitutional.

THE following order was passed by the Senate on March 19, 1912, and on March 25, 1912, was transmitted to the Justices of the Supreme Judicial Court. On May 6, 1912, the Justices returned the answers which are subjoined.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following questions of law:

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First. If the Legislature has the constitutional right to authorize the payment from the treasury of the Commonwealth of money, or the erection of statues, or the bestowal of medals, decorations or other badges of honor as appropriate recognition of distinguished and exceptional service to the Commonwealth, believing such recognition to be founded upon moral and honorable obligation and upon principles of right and justice, and believing further that the dignity of the State will be enhanced and the loyalty and patriotism of the people will be promoted by such action, and that the public good will be served, — is the action of the Legislature subject to review by the judicial branch of the government, or is the decision as to such appropriations left to the conscience of the Legislature?

Second. If the Legislature enacts a law providing for the payment of sums of money to certain veterans of the civil war who volunteered, believing that such recognition will serve the public good by bringing home to all minds by visible facts that, should the call again come for volunteers, those who offer their lives in defense of their country can receive such recognition from a grateful people, would the enactment of such a law be within the constitutional power of the Legislature?

AND BE IT FURTHER ORDERED, That the Justices of the Supreme Judicial Court be informed that the foregoing questions are propounded with a view to legislation upon the subjects therein mentioned, and that, for their more particular information, a copy of Senate document No. 240, being a bill accompanying a petition now pending in the Legislature and relating to the subject matter concerning which the foregoing questions are propounded, be transmitted to the justices.

[The bill Senate document No. 240 was entitled "An Act to provide for suitably rewarding certain veteran soldiers and sailors." See St. 1912, c. 702.]

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the undersigned Justices of the Supreme Judicial Court, have received the questions of which a copy with the order relating thereto and the act referred to therein is hereto annexed, and respectfully answer as follows:

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We construe the questions submitted to us as requiring our opinion concerning the constitutionality of the act referred to in the order, which is now pending in the Senate. It is only where it will be of assistance in pending matters that our opinion can be required.

The question is primarily one of taxation. Money can be raised by taxation only for a public purpose. And the question resolves itself into the inquiry whether the proposed expenditure will be for the public good, or for the private benefit of individuals. If the former, the act will be constitutional; if the latter, it will be unconstitutional.

The act provides for the payment of gratuities of $125 each to veteran soldiers and sailors still living, who volunteered in the Civil War and served during the war in the army or navy to the credit of the Commonwealth and were honorably discharged and received no bounty. Conscripts and substitutes are excluded by the express terms of the act. The gratuity is to be given for the purpose, as declared in the act, "of promoting the spirit of loyalty and patriotism, and in recognition of the sacrifice made both for the Commonwealth and for the United States by those veteran soldiers and sailors who volunteered their services in the Civil War, and for the purpose of promoting the public welfare, by giving visible evidence to this and future generations that, if danger should again threaten the nation and the call should again come for men, Massachusetts will not forget the great service of those who volunteer." It is expressly provided that the "gift shall not be a bounty, nor a payment in equalization of bounties, nor a payment for services rendered, nor a payment for the purpose of making the result of their contracts of enlistment more favorable to them because the contracts of other soldiers were on better terms, but a testimonial for meritorious service such as the Commonwealth may rightly give, and such as her sons may honorably accept and receive."

We are bound to take as true the purposes declared in the proposed act as those, and those only, which the Legislature has in view in its enactment. The good faith which is due from one co-ordinate branch of the government to another requires that assumption. But substance rather than form must be regarded,

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and if it appears that notwithstanding the affirmations and negations contained in the act it will and must operate to authorize the payment of bounties similar to those which soldiers received at the time of their enlistment, or in equalization of such bounties, then it must be pronounced unconstitutional. *Mead* v. *Acton*, 139 Mass. 341. *Opinion of the Justices*, 186 Mass. 603. In both of the cases referred to it was held that the object of the statute was to give such bounties and that that could not be done for the reason that bounties were given to encourage enlistments and to aid towns and cities in filling their quotas and, the war being over, the payment of such bounties would now serve no public purpose, but would be for the private benefit of individuals. This was the sense in which the word "bounty" was used in *Mead* v. *Acton*, *supra*, and in the *Opinion of the Justices* cited above, and is the sense, we think, in which it is used in the act before us. Construing the act as it seems to us that it must and should be construed, it applies only to those cases where the soldier voluntarily enlisted in his own proper name from purely patriotic motives, without the payment of a bounty or other extraordinary pecuniary consideration, and served during the war and was honorably discharged. It cannot be said that a gratuity given, as the act declares, as "a testimonial for meritorious service" and in recognition of services rendered and sacrifices made, and not as a bounty or in equalization of bounties, must nevertheless be regarded as a bounty or as given in equalization of bounties. Nor can it be inferred from the fact that one of the conditions is that the gratuity shall not be paid to a person who has received a bounty, that it is intended as a bounty or as a payment in equalization of bounties. The question then is whether it is within the power of the Legislature to authorize the payment as "a testimonial for meritorious service" of gratuities to persons who come within the terms of the act as we construe it, if the Legislature is of the opinion that the payment of such gratuities to such persons in recognition of the sacrifices which they made and the motives which prompted them to enlist, will tend to encourage the spirit of loyalty and patriotism and so to promote the public good by affording visible evidence that if hereafter there should be a call for men the Commonwealth will not forget those who volunteer. On that question the *Opinion of the Justices* in 190 Mass. 611,

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seems to us to be decisive. In that case a question was submitted by the Senate whether it was within the power of the General Court to appropriate money in recognition of valuable services performed by persons who served to the credit of Massachusetts during the Civil War and were honorably discharged, if in the opinion of the General Court the public good would be served and loyalty and patriotism promoted; — the money so appropriated to be used either for the payment of sums of money to such persons, or for medals or other evidences of appreciation of such services. The question was answered in the affirmative. See also the *Opinion of the Justices*, 175 Mass. 599. These two opinions show, we think, that it is within the constitutional power of the Legislature to authorize the payments provided for in the proposed act if in their judgment such payments will promote the public good in the manner described. It should be noted that a majority of the Justices sustained the constitutionality of the Veteran's Preference Act, so called, on grounds similar to those on which we think that the act before us must be held to be constitutional. See *Opinion of the Justices*, 166 Mass. 589, 595. A gift of money has in it an element of private benefit which does not pertain to the erection of a statue or a monument which all may see, or even to the gift of a medal or other badge of honor which may be handed down as an object of just pride to the donee's descendants. But, as in the case of pensions, it always has been recognized as one of the ways in which meritorious service may be rewarded. The war has long been over, but there is nothing in that fact which renders the act unconstitutional, however strongly it may bear upon the expediency of the proposed legislation. We need not say that if the real object of the proposed legislation is the payment of bounties or the equalization of bounties it is unconstitutional and money cannot be lawfully raised by taxation for that purpose.

Whether, taking all of the circumstances into account, the proposed legislation will be expedient, and whether gratuities such as it is proposed to give will tend to promote the public good by encouraging the spirit of loyalty and patriotism, is for the Legislature, acting under the responsibility of their official oaths, to say.

We answer the second question in the affirmative. The action

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of the Legislature covered by the first question is not subject to review by the judicial branch of the Government.

JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
CHARLES A. DECOURCY.

To the Honorable Senate of the Commonwealth of Massachusetts:

Questions from the legislative department are addressed to the Justices of the Supreme Judicial Court as individuals and require a statement of personal opinion. Being unable to assent to the views expressed by the other Justices, I respectfully give this as my answer:

It has been said repeatedly that the provision of the Constitution requiring the Justices to give opinions to each branch of the Legislature and to the Governor and Council is for the purpose of enabling these departments to gain such assistance as may come in this way in the performance of their official duties as to pending matters. *Opinions of the Justices*, 190 Mass. 611; 186 Mass. 603; 145 Mass. 587; 122 Mass. 600. Therefore these questions are interpreted as requiring an opinion as to the constitutionality of Senate Bill No. 240, referred to in the order.

The controlling constitutional principle relates to taxation. Public money comes from the people. The people can be taxed only for public uses. They cannot be required to contribute for the private benefit of any person or class of persons. Subsidiary to this general statement, there are two propositions as to gratuities to those who were soldiers in the Civil War. One is that the power to reward public service of unusually distinctive and pre-eminent character for the purpose of promoting patriotism and encouraging loyalty is an attribute of a sovereign government. This applies to Massachusetts, in dealing with those of her citizens who served to her credit in the armies of the United States, notwithstanding our dual system of government. *Opinion of the Justices*, 175 Mass. 599. *Opinion of the Justices*, 190 Mass. 611.

The other proposition is that there can be no gift to them for the purpose of equalizing bounties. Those who enlisted without

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receiving such inducements at the time cannot be given now a sum of money for that reason. This is not a public use. That was decided directly in *Mead* v. *Acton*, 139 Mass. 341, and said in *Opinion of the Justices*, 186 Mass. 603, and in *Opinion of the Justices*, 190 Mass. 611. Such payments of money would not be based on any difference in the kind of service rendered or in the merit of the soldier, but upon an arbitrary distinction. This has been the constitutional law of the Commonwealth for many years. *Mead* v. *Acton*, 139 Mass. 341, was a case where the town of Acton was authorized by express act of the Legislature to pay $125 to certain soldiers who volunteered for service during the Civil War to the credit of the town, and who had received no bounty. There is no distinction in this respect between the power of the Legislature to authorize a city or town to appropriate money and to appropriate itself money from the treasury of the Commonwealth. It was said in that case: "The object for which the town of Acton has raised this money is private, and not public. The town has made no promise to these soldiers, and is not under any obligation to pay them any bounties. The purpose is not to repay any sums advanced them as an inducement to enlist. . . . The war has been over for many years, and the payment of these bounties cannot encourage enlistments, or in any way affect the public service, or promote the public welfare. The direct primary object is to benefit individuals, and not the public. In any view we can take of the statute, the payments it contemplates are mere gratuities or gifts to individuals." This language is unmistakable in meaning. It is the general and only ground of the decision. It was a judgment of the court in a case arising between parties touching the constitutionality of a statute. This decision was made and these words used in the light of the well established rule by which courts must be governed on such occasions, "that when a statute has been passed with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and that the court will not declare it to be a violation of the fundamental principles of our government, and for that reason void, unless its invalidity is established beyond reasonable doubt. . . . It is the duty of this court to presume that the Legislature intended to act under that portion [of the Constitution] which will support the statute and give it validity, unless its language is so clear and

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explicit as to render it impossible by any reasonable construction so to interpret it." *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428, 431, 432. While "bounty" (the word of St. 1882, c. 93, under consideration in *Mead* v. *Acton*), as used in its narrower significance in 1863, 1864 and 1865, in statutes authorizing bounties to volunteer soldiers, meant money paid to induce enlistment, it has also the wider meaning of payments "in consideration of services rendered or to be rendered, objects of public interest to be obtained . . . or moral obligations to be recognized." *Allen* v. *Smith*, 173 U. S. 389, 402. In this comprehensive sense it includes even pensions. It is plain that it must have been used in this broader sense of including gratuities and testimonials for services already rendered in the donative words of the statute discussed in *Mead* v. *Acton*. The war had been ended a long time, and the payment could not have been thought to be an inducement for future service by the persons to whom it was to be paid. If the statute could have been sustained as a reward or recognition for distinguished services already rendered, it would have been upheld on that ground. Yet the court said that in no aspect of the statute could the payments required by it be held to be anything else than "mere gratuities or gifts to individuals." This case has been cited with approval many times by courts of this and other jurisdictions. In *Kingman* v. *Brockton*, 153 Mass. 255, the question was presented whether a town could be authorized to provide in a public building a hall for the meetings of a Post of Grand Army Veterans, and it was decided that this use of public money was not for a public purpose. Although it has been intimated that perhaps some language of the opinions in these cases went rather far (see *Opinion of the Justices*, 175 Mass. 599), no doubt ever has been or properly could be cast upon any of that here quoted, and the cases always have been treated as rightly decided and as binding authorities. They seem to me to be decisive against the constitutionality of the present bill.

St. 1904, c. 458, was an act providing for the payment of $125 from the treasury of the Commonwealth to certain veterans of the Civil War, to be selected in precisely the same way as that set forth in § 2 of the present proposed act. It was not described either as a bounty or a testimonial. Although the word "bounty" oc-

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curred in the title of the act, it is apparent that it could not have been used by the Legislature in its narrow sense, but in the broader signification above defined. In the *Opinion of the Justices;* 186 Mass. 603, given to the Governor and Council, it was held, after ample discussion, that this statute was unconstitutional, although of course the Justices were bound to hold it a valid exercise of legislative power under the principle heretofore stated, if it had been in any way possible to do so, either as a recognition of sacrifice, a provocative of the spirit of loyalty, or a "testimonial for meritorious service."

It is a canon of constitutional interpretation that the declaration of purpose in an act of the Legislature must be accepted as true unless inconsistent with the meaning and effect of its operative features. If a public use is stated by the words of the act, it will be held to be constitutional, unless its provisions can have no tendency to advance such public use. *Hazen* v. *Essex Co.* 12 Cush. 475, 477. *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 145.

The proposed act must be examined in the light of these principles and these decided cases. The title is "An Act to provide for suitably rewarding certain veteran soldiers and sailors." Sections 1 and 2 contain elaborate description of patriotic motive and desire to cultivate loyalty. Taken by themselves alone and dissociated from the context or applied to other appropriate subjects, these words declare a constitutional purpose. But when statutes authorizing the expenditure of public money are under consideration, it is their substance and not their verbal dress and setting which governs. An object which in essence is unconstitutional cannot be made harmless merely by a name.

This act does not undertake to reward all volunteers. It selects a specified class. It does not base the determination of that class upon any difference in hardships undertaken or sufferings undergone, bravery shown on the battle field, or soldierly fortitude exhibited in any experience of war. Those designated as recipients of the gratuity are the living and honorably discharged volunteers who were neither conscripts nor substitutes, and who did not receive a bounty from the Commonwealth or one of its municipalities. A bounty, as that word was used in the Civil War statutes, was connected with the contract of enlistment, and had no relation whatever to service rendered. It had no reference to

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"meritorious service" to the Commonwealth or nation, because necessarily it ante-dated such service. Hence the fact that it was not received cannot furnish the foundation for a "testimonial for meritorious service" (which are the words of the act). This is not a classification based on merit in the kind of work done or on any special heroism displayed. It is founded upon a circumstance arising before any service was rendered. It is not grounded upon any legal or moral obligation. It is based wholly upon an accidental condition quite independent of any military or naval duty performed for the nation. A payment on these considerations is not in the public interests, and cannot have any tendency to promote patriotism in a general public sense. A purely arbitrary selection of persons who are to receive gratuities cannot promote the public welfare. It was said in *Opinion of the Justices*, 190 Mass. 611, 614, respecting the same subject matter, about which inquiry is now made: "It is a familiar rule of law that a statute is to be interpreted in reference to its purpose and effect, as shown by its application to the subject to which it relates. If a bill should appear, by its substantive provisions, to be a measure for the equalization of bounties among the soldiers of Massachusetts who served in the Civil War, or for the payment of moneys to make the result of their contracts of enlistment more favorable to certain soldiers because the contracts of other soldiers were made on better terms, it would be unconstitutional, even if it contained recitals that the payments would be made in recognition of valuable services, with a view to the promotion of loyalty and patriotism."

This language applies exactly to the provisions of the bill now presented to us. Its payments are based avowedly and exclusively on the single ground that the class proposed to be benefited has not received a bounty. Its substance, in the number and character of volunteer soldiers to be benefited, in the manner of their selection, in the amount of money to be paid to each, and in the total to be paid from the public treasury, is precisely the same as in statutes or bills heretofore declared unconstitutional upon principles which are uncontrovertible and are well settled. A more emphatic assertion of patriotic purpose on the part of the Legislature cannot change the nature of the acts to be done. Elegant rhetorical phrases do not alter the constitutional aspects of a statute whose substance remains the same.

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No one realizes better than the undersigned how ungracious it may seem to decide against a statute for rewards to veterans of the Civil War, but it is our duty to interpret the Constitution without yielding to the impulses of patriotic emotion. I feel obliged to answer that the Senate Bill No. 240 would be unconstitutional if enacted.

Mr. Justice Sheldon asks to be excused from answering because of a possible personal interest in the subject matter of the proposed legislation.

ARTHUR P. RUGG.

OPINION OF THE JUSTICES TO THE SENATE.

A statute undertaking to exempt trade unions and associations of employers and their members and officials from liability for tortious acts committed by or on behalf of such a union or association would be unconstitutional.

THE following order was passed by the Senate on April 22, 1912, and on April 26, 1912, was transmitted to the Justices of the Supreme Judicial Court. On May 8, 1912, the Justices returned the answer which is subjoined.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following question of law:

Is an act of the Legislature constitutional which provides that an action shall not be entertained by any court against a trade union, or an association of employers, or against any members or officials thereof, in respect to a tortious act alleged to have been committed by or on behalf of a trade union or an association of employers?

AND BE IT FURTHER ORDERED, That the Justices of the Supreme Judicial Court be informed that the foregoing question is propounded with a view to legislation upon the subject therein mentioned, and that, for their more particular information, a copy of House Document No. 377, being a bill accompanying a petition now pending in the Legislature and relating to the subject-matter concerning which the foregoing question is propounded, be transmitted to the Justices.

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To the Honorable Senate of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the question upon which our opinion is required by the order of April 22, 1912, a copy of which is hereto annexed, and respectfully submit this opinion:

The Constitution of the United States in art. 14 of the Amendments expressly provides that: No State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Absolute equality before the law is a fundamental principle of our own Constitution. Frequent expressions to this effect are found in various articles. For example, it is said that "All men are born free and equal;" that "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws;" that "Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character;" and that the several departments of government are separated "to the end it may be a government of laws and not of men." Declaration of Rights, art. 1, 10, 11 and 30.

The proposed bill to exempt associations of employers and trade unions and their members and officials from actions of tort committed by or on behalf of such association or union is plainly contrary to these constitutional guaranties. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection to safety, liberty and property which any free government must secure to its subjects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated. It imposes upon

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some burdens of which others in like situation are relieved. It throws obstacles in the pathway of those outside unions or associations in the pursuit of their livelihood and in the prosecution of their business not interposed in the way of members of such organizations. It purposes to give to one class of wage-earners advantages withheld from others not belonging to a trade union who are engaged in the same kind of work and for the same employer. It frees one set of employers from obligations to which their competitors, who are independent of the association, are subjected. In short, it destroys equality and creates special privilege.

Manifestly, it needs no discussion and no further statement to demonstrate that legislation like that embodied in the bill would violate in many respects underlying principles and fundamental provisions of the Constitution of this Commonwealth and of the United States.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

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OPINION OF THE JUSTICES TO THE GOVERNOR.

Whether under c. 3, art. 2 of the Constitution the Governor alone can require the opinions of the Justices in regard to a bill laid before him for his revisal under c. 1, § 1, art. 2 of the Constitution, here was referred to as a question left open for future consideration.

A statute, forbidding any person engaged in the production or distribution of a commodity in general use to discriminate in the price of such commodity between different parts of the Commonwealth or between different purchasers, either maliciously or for the purpose of destroying the business of a competitor and of creating a monopoly, and also prohibiting combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly, is within the police power of the Legislature, and, as it affects interstate commerce only indirectly, is not in violation of art. 1, § 8 of the Constitution of the United States.

IN answer to a letter received from the Governor, containing the question described below, the Justices of the Supreme Judicial Court on May 27, 1912, returned the answer which is subjoined.

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The question contained in the letter of the Governor was in regard to the constitutionality of House Bill No. 2247, entitled "An Act to prohibit discrimination in the sale of commodities," of which the first two sections were as follows:

SECTION 1. Any person, firm, association or corporation, foreign or domestic, doing business in the Commonwealth and engaged in the production, manufacture or distribution of any commodity in general use, that shall maliciously, or for the purpose of destroying the business of a competitor and of creating a monopoly in any locality, discriminate between different sections, communities, towns or cities of this Commonwealth or between purchasers by selling such commodity at a lower rate for such purpose in one section, community, town or city than is charged for such commodity by the vendor in another section, community, town, or city in the Commonwealth, after making due allowance for the difference, if any, in the grade or quality and in the cost of transportation shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

SECTION 2. It shall be unlawful for any person, firm, association or corporation to combine with any other person, firm, association or corporation for the purpose of destroying the trade or business of any person, firm, association or corporation, engaged in selling goods or commodities and of creating a monopoly within this Commonwealth, and any such combination is hereby prohibited and declared unlawful.

To his Excellency,
Eugene N. Foss,
Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court have received your letter requesting their opinion as to the constitutionality of House Bill No. 2247, which is now before you for revisal under c. 1, § 1, art. 2 of the Constitution.

There are grave doubts whether the Governor alone is empowered to require their opinion touching a matter arising in the performance of this duty of revisal. There has been no sufficient opportunity for all the Justices to investigate, consult and deliberate upon this point since the receipt of the letter of your Excellency.

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We leave open for future consideration this question, and the answer now made is not to be taken as an expression of opinion upon it.

The bill relates to the subject of commerce. As no legislation of any State can have extra-territorial force, it is plain that this statute affects only sales made within the Commonwealth. It does not reach to transactions where the contract of sale is made without the Commonwealth, and the delivery only takes place to a purchaser within the Commonwealth. Its title is "An Act to prohibit discrimination in the sale of commodities." The first section appears to have two main purposes: First, it prohibits any person engaged in general business in the Commonwealth from maliciously discriminating, in prices of commodities sold, between different parts of the Commonwealth or between different purchasers; and second, it prohibits any discrimination in such prices for the purpose of destroying the business of a competitor and of creating a monopoly. The kind of discrimination which is prohibited by this section is the charging of a lower price for the sale of a commodity in one part of the Commonwealth than in another, after making allowance for the difference due to quality and cost of transportation. The second section prohibits combinations, for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly.

There is no constitutional objection to a statute which prohibits an act done for the express purpose of annoying or injuring another and with actual malevolence, although the same act done with an innocent intent is lawful. *Rideout* v. *Knox*, 148 Mass. 368. *Morrison* v. *Lawrence*, 186 Mass. 456, 462.

A monopoly of any commodity in general use is illegal at common law. *Alger* v. *Thacher*, 19 Pick. 51, 54. It is not beyond the power of the Legislature to prohibit contracts or combinations which are designed and have a tendency to create a monopoly. This is in substance the effect of the first section of the federal anti-trust statute. *Standard Oil Co.* v. *United States*, 221 U. S. 1. It does not detract from the force of such a prohibition that the act tending toward monopoly must be combined with a design to destroy the business of a competitor or of some other person before constituting the conduct forbidden by the statute. Although the statute is in some respects a limitation upon freedom of contract,

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yet we are of opinion that it does not go beyond the police power of the Legislature. *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423. *Waters-Pierce Oil Co.* v. *Texas*, (No. 1) 212 U. S. 86. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322. *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114. *Noble State Bank* v. *Haskell*, 219 U. S. 104. *Mutual Loan Co.* v. *Martell*, 222 U. S. 225.

The statute does not seem to be aimed at interstate commerce, although it may interfere to some extent with such commerce. If, however, it is a valid exercise of the police power, it is not fatal to its validity that its operation imposes some limitation upon the freedom of interstate commerce. It comes within the class of statutes which incidentally, but not primarily, affect interstate commerce, and hence are not forbidden by the commerce clause of the Constitution of the United States. *Commonwealth* v. *Peoples Express Co.* 201 Mass. 564, and cases cited at 578. In all of its constitutional aspects the statute is fairly covered by *Commonwealth* v. *Strauss*, 191 Mass. 545. See *Opinion of the Justices*, 193 Mass. 605, at 610.

The other sections of the act are framed for the purpose of making effective and enforcing the terms of §§ 1 and 2. We do not perceive, in the incomplete examination and analysis which the time at our disposal has enabled us to make, any provision not susceptible of a construction in harmony with the respective provisions of the Constitution of the Commonwealth and of the United States.

There has been no opportunity to consult with Mr. Justice Loring in answering this question.

Arthur P. Rugg.
James M. Morton.
John W. Hammond.
Henry K. Braley.
Henry N. Sheldon.
Charles A. DeCourcy.

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Opinion of the Justices to the House of Representatives.

The Legislature have no power to authorize the use of money of the Commonwealth, or of money deposited in the treasury of the Commonwealth by savings banks under St. 1908, c. 590, § 56, to purchase land, and develop, build upon, rent, manage, sell and repurchase it, for the purpose of "providing homes for mechanics, laborers or other wage-earners," or "for the purpose of improving the public health by providing homes in the more thinly populated areas of the State for those who might otherwise live in the most congested areas of the State."

The following order was passed by the House of Representatives on May 6, 1912, and on May 10, 1912, was transmitted to the Justices of the Supreme Judicial Court. On May 28, 1912, the Justices returned the answer which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required on the following important questions of law:

First. Are the provisions of the bill to extend and define the duties of the Homestead Commission, now pending in the House of Representatives, copies of which are submitted herewith, constitutional, and particularly are the provisions of section one of said bill constitutional?

Second. Would the provisions of said bill, and particularly the provisions of section one of said bill, be constitutional if the following amendment of section one, now pending in the House of Representatives, were adopted: Strike out, in lines five and six, the words "providing homes for mechanics, laborers or other wage-earners," and insert in place thereof the words "for the purpose of improving the public health by providing homes in the more thinly populated areas of the State for those who might otherwise live in the most congested areas of the State"?

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned Justices of the Supreme Judicial Court have considered the questions submitted to them, a copy of which is hereto annexed, and answer as follows:

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The questions relate to the constitutionality of a bill entitled "An Act to extend and define the duties of the homestead commission." The general scheme embodied in the proposed bill is that the Commonwealth shall purchase land, and develop, build upon, rent, manage, sell and repurchase the same. The Homestead Commission is clothed with the fullest power to go into the business of buying, renting and selling real estate. As expressed in the bill, its purpose is to provide homes "for mechanics, laborers, or other wage-earners," or as suggested by the amendment set forth in the second question, to improve "the public health by providing homes in the more thinly populated areas of the State for those who might otherwise live in the most congested areas of the State." In a constitutional sense the difference between these two statements of purpose is not material in view of the actual provisions of the bill. The substance of it is that the Commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers. It is not a plan for pauper relief.

The question is whether this is a public use.

To this fundamental test must be brought all governmental activity in every system based upon reason rather than force. The dominating design of a statute requiring the use of public funds must be the promotion of public interests and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified. Government aid to manufacturing enterprises, the development of water powers and other natural resources by private persons or corporations with public funds, either through loans or by the more indirect method of exemption from taxation or taking of stock, have been universally condemned by courts throughout the country, although often attempted by legislation. The leading case is *Lowell* v. *Boston*, 111 Mass. 454, where a statute was considered authorizing the city of Boston to issue bonds for the raising of money to be lent to owners of real estate whose buildings had been destroyed in the devastation wrought by the Boston fire of 1872. This statement of the law by Mr. Justice Wells, at 461, hardly can be surpassed for accuracy and clear-

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ness: "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." This principle has been applied to a great variety of cases. It was amplified with a full citation of authorities in *Opinion of the Justices*, 204 Mass. 607.

The question, in its last analysis is one of taxation. Can the Commonwealth raise money by taxation for the purposes set forth in the act?

Taxation is the ultimate question notwithstanding the provisions of § 3, which authorize the treasurer and receiver-general to lend to the commission, from funds deposited in the treasury of the Commonwealth by the savings banks under St. 1908, c. 590, § 56. This statute requires payment to the treasurer of the Commonwealth of all deposits in savings banks whose owners are unknown, which have remained untouched for thirty years. The constitutionality of this statute was upheld in *Attorney General* v. *Provident Institution for Savings*, 201 Mass. 23; *S. C.* 221 U. S. 660, on the express ground that the money is to be held and used by the Commonwealth "in recognition of the rights of the owner, and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto. The Commonwealth, under the statute, becomes a kind of trustee for the owner." These funds belong to a large number of persons. It may be that some never will be reclaimed, while undoubtedly some of them will be demanded. This bill does not contemplate a mere investment of funds in such form that they may be available for payment

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to the real owner when he appears. On the contrary its manifest purpose is a permanent investment not subject to repayment in any form for at least six years, and thereafter only by instalments. It does not appear how large the savings bank deposit is, nor is that material. The Commonwealth holds the entire fund as trustee and must be ready to pay it to the owners on demand. So far as the Commonwealth by a permanent investment renders itself unable to make such repayment on demand, it must be ready to repay out of other funds. But these can be raised only by taxation. In any event, therefore, the question is one of taxation. It is too obvious for discussion that the proposed loan is not an investment on any theory of trusteeship, which courts are bound to administer. *Dickinson, appellant,* 152 Mass. 184. *Brigham* v. *Morgan,* 185 Mass. 27. While these rules may not bind the Legislature in dealing with trust funds held by the State, a wide divergence from them stamps the character of the act as an appropriation and not as an investment. Nor can it be said that this is an investment on the ground that such funds may not be claimed. This would be contrary to the principle on which the constitutionality of the statute was upheld and under which the Commonwealth obtained possession of the money. It would be treating the money in substance as escheated. Even if it were escheated it then would be money in the treasury freed from any trust. Such money, however, is public money and can be appropriated only to public uses. It can no more be diverted for private benefit than can money raised by taxation. *Simmons* v. *Hanover,* 23 Pick. 188. *Allen* v. *Marion,* 11 Allen, 108.

Taxation is somewhat historical in its nature and can be most intelligently approached by comparison of those subjects which have been held to be a public use and those which have been held not to be a public use. It is not now open to question that the establishment and maintenance of water and sewerage systems and electric light and gas plants are public uses. They relate to commodities which are or have become universally necessary, and they cannot be procured by each individual or family acting separately, but require co-operation. As a practical matter provision for these necessities is monopolistic in character, and having due regard to the reasonable convenience of the public, there can be no competition respecting them. The permanently exclusive

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use of portions of the public ways is essential to the effective furnishing of these necessities. Highways are public in their nature, and their construction and repair are legitimate public expenses. Hence they cannot be appropriated to any use which is private. These necessities cannot be provided without the exercise of powers conferred only by the Legislature, and commonly require the exercise of eminent domain. Although water and artificial light are in a certain sense beneficial to individuals, their public functions are so overshadowing as to mark them as proper subjects for State or municipal ownership. *Opinion of the Justices*, 150 Mass. 592.

On the other hand it was said in *Opinion of the Justices*, in 1892, 155 Mass. 598, and again in 1903, 182 Mass. 605, that it was beyond the power of the Legislature to authorize cities and towns to engage in the business of furnishing coal or fuel to the public. The economic aspects of conducting business of this character through public instrumentalities are not for our consideration. Such a system is not possible under our Constitution. The grounds upon which these opinions were founded are that such enterprises are conducted by individuals. They are universally recognized as legitimate and proper fields for private and personal adventure. No legislative authority is required to engage in them, and no powers derived from that source are needed for their prosecution. It is a natural right subject only to regulation by the police power. A person lawfully engaged in such business cannot be driven out by taxation to support his rival even though that rival be an arm of government.

The questions of the present order are closely analogous to those raised by the order of the Honorable House considered in *Opinion of the Justices*, 204 Mass. 607. It was said there in substance that it was not within the power of the Legislature to authorize the taking of land outside the limits of streets for the purpose of being leased or sold under such restrictions as would insure proper development of industrial and commercial facilities. Such purpose was said to be primarily for the aggrandizement of individuals and only incidentally for the promotion of the public weal. We are unable to distinguish the purchase, development, renting and sale of land in the manner provided by the present bill from the principles announced in these decisions and opinions and

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many others collected and somewhat reviewed in 204 Mass. 607.

Buying and selling land always has been freely exercised by all individuals who desired, under the Constitution. Proprietorship of his own home has been one of the chief elements of strength in the citizen, and widely diffused land ownership has conferred stability upon the State. It is matter of common knowledge that thousands of inhabitants of the Commonwealth who are "mechanics, laborers or other wage-earners" have become, through industry, temperance and frugality, owners of the homes in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the State to aid in acquiring a home others whose temperament, environment or habits have heretofore prevented them from attaining a like position. Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage-earner might be taken by the power of the Commonwealth for the purpose of handing it over to another wage-earner. Neither the power of taxation nor of eminent domain goes to this extent. If the purpose is a public one, the property of every inhabitant, however improved or used, must yield to the superior right. But if the end to be gained is not public, no one can be compelled to contribute under either form of governmental power.

Ownership of a bit of land is one of the deep seated desires of mankind. The property resting on such proprietorship is among the dearest rights in the minds of many people secured by the Constitution. If the power exists in the Legislature to take a tract of land away from one owner for the purpose of enabling another to get the same tract, the whole subject of such ownership becomes a matter of legislative determination and not of constitutional right.

Experiments in other lands, where the people have established either no bounds or fragile ones to the absolutism of governmental powers by a written constitution, afford no guide in the determination of what our Constitution permits.

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It may be urged that the measure is aimed at mitigating the evils of overcrowded tenements and unhealthy slums. These evils are a proper subject for the exercise of the police power. Through the enactment of building ordinances, regulations and inspection as to housing and provision for light and air lies a broad field for the suppression of mischiefs of this kind.

For these reasons the Justices of the Supreme Judicial Court (with the exception of Mr. Justice Loring, whom there has been no opportunity to consult) respectfully answer both questions in the negative.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

ANSWER OF THE JUSTICES TO THE COUNCIL.

Without considering whether under c. 3, art. 2 of the Constitution the Council without the concurrence of the Governor may require the opinions of the Justices, the Justices declined to answer a question addressed to them by the Council where it did not appear to what, if any, pending matter the question related.

ON May 1, 1912, the following order was adopted by the Council and on May 2, 1912, was transmitted to the Justices of the Supreme Judicial Court. On May 31, 1912, the Justices returned the answer which is subjoined.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law:

When the law calls for action "by the Governor and Council," is the Governor to concur with a majority of the Council in order to make its decisions effective, or is he to be considered a member of the deciding body, with one vote?

To the Honorable Council:

Your question under date of May 1, 1912, is this: "When the law calls for action 'by the Governor and Council,' is the Governor

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to concur with a majority of the Council in order to make its decisions effective, or is he to be considered a member of the deciding body with one vote?"

The requirement of the Constitution is that the Justices of the Supreme Judicial Court give opinions to the Governor and Council "upon important questions of law, and upon solemn occasions." This provision has been construed to mean that such opinions may be required only respecting pending matters in order that assistance may be gained in the performance of a present duty. *Opinions of the Justices*, 186 Mass. 603, 608; 190 Mass. 611, 612. It has been customary for the specific pending matter to be stated or referred to in the inquiry, to the end that a more intelligent and helpful answer be given than otherwise would be possible. It is apparent that the requirement for such opinions is to be somewhat sparingly exercised. This is obvious from the phrase of the Constitution as well as from the practice which has grown up under it. It is not as to any question of law that the requisition may be made, but only upon "important questions of law." The Legislature has made ample provision for the advice by the Attorney General as to usual legal difficulties presenting themselves either to the House of Representatives or to the Senate or to the Governor and Council. R. L. c. 7, § 8, as amended by St. 1908, c. 586. It is impossible to determine from your question whether the pending matter is of such a character that we ought to answer. *Opinions of the Justices*, 122 Mass. 600; 148 Mass. 623; 150 Mass. 598; 208 Mass. 614. We are of opinion that under these circumstances, and without considering whether under the Constitution the Council alone without the concurrence of the Governor may require the opinion of the Justices, we must ask respectfully to be excused from answering the question.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

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Opinion of the Justices to the Governor and Council.

Under St. 1909, c. 504, § 18, by which the trustees of a State institution covered by the provisions of that chapter are authorized to determine the salaries of all the officers of the institution, "subject to the approval of the Governor and Council," such approval must be given by the Governor and also by the Council, each acting independently of the other and not sitting together as a single executive board.

The following communication from the Governor and Council was transmitted to the Justices of the Supreme Judicial Court on June 6, 1912. On June 21, 1912, the Justices returned the answer which is subjoined.

June 5, 1912.

To the Honorable Justices of the Supreme Court:

Under date of May 1, 1912, the Governor and Council propounded to you the following question: "When the law calls for action 'by the Governor and Council,' has the Governor to concur with a majority of the Council in order to make its decision effective, or is he to be considered a member of the deciding body with one vote?"

We have the honor to acknowledge receipt of your reply, in which you say: "It has been customary for the specific pending matter to be stated or referred to in the inquiry, to the end that a more intelligent and helpful answer be given than otherwise would be possible." You go on to say: "It is apparent that the requirement for such opinions is to be somewhat sparingly exercised" and you further say: "It is impossible to determine from your question whether the pending matter is of such a character that we ought to answer."

Under date of April 16, 1912, the trustees of the Westborough State Hospital voted to appoint a superintendent at a yearly salary of $4,000 and requested the approval of their action "by the Governor and Council."

Thereupon His Excellency held that, since he did not give his approval, a majority of the Councillors to the contrary could not prevail.

The salary in question is an advance upon the scale now in

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force, and its approval might be expected in time to be followed by a large number of increases of salaries in State institutions that would be a material addition to the expenses of the Commonwealth.

The statutes provide that various administrative acts involving the expenditure of money must be approved "both by the Governor and Council."

We respectfully submit that it is important to determine how this approval may lawfully be given or withheld.

By order of the Executive Council.

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The substance of your question of June 5, 1912, a copy of which is hereto annexed, is whether an increase of the salary of the superintendent voted by the trustees of the Westborough State Hospital must be approved by the Governor and also approved by the Council in order to be effective.

The answer depends upon the true construction of the words "subject to the approval of the Governor and Council" found in St. 1909, c. 504, § 18, which authorizes the trustees of the hospital to determine the salary of the superintendent as well as all other officers, subject to such approval.

It was said in *Opinion of the Justices*, 190 Mass. 616, at 618, that "The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council."

Duties of the first class to be performed by the executive board are conferred in the Constitution often by the words "Governor and Council," or "the governor with five of the council," or other equivalent language. See Const. Mass. c. 1, § 3, art. 11; c. 2, § 4, art. 2; c. 3, art. 2, 5; c. 6, art. 1; Articles of Amendment, 12, 13. Those of the second class, where the initiative rests upon the Governor and the connection of the Council is advisory, are described frequently by the words "Governor by and with the advice and

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consent of the Council," or a similar phrase of like meaning. c. 1, § 1, art. 4; c. 2, § 1, art. 5, 6, 8–11. Articles of Amendment, 4, 17, 25, 37.

When an act of the Legislature imposing duties upon the Governor and Council is to be interpreted, the question is which kind of action is required.

The substance of the subject matter to be acted on is of greater significance than nicety of verbal construction in determining the intent of the Legislature. The power ultimately to fix the salaries of the officers and employees of the various public institutions is important in its bearing upon the finances of the Commonwealth. It affects or may affect the general State tax to an appreciable extent. The Constitution creates the Governor the "supreme executive magistrate," and by two separate articles clothes him with individual responsibility touching the finances. In c. 1, § 1, art. 4, it is provided that the receipts from taxes and excises shall be "issued and disposed of by warrant, under the hand of the governor . . . with the advice and consent of the council," while in c. 2, § 1, art. 11, is this language: "No moneys shall be issued out of the treasury of this Commonwealth . . . but by warrant under the hand of the Governor for the time being, with the advice and consent of the Council." As chief executive he is answerable in a general sense for the administration of government. These articles of the Constitution impose upon him a particular duty respecting the finances of the Commonwealth. Although under our Constitution he is only a part of the executive department, he is styled the "supreme executive magistrate." c. 2, § 1, art. 1.

Under that portion of our Frame of Government which creates a chief executive, it is a fundamental conception that he may be held by the people to some degree of direct accountability for the disposition of the public revenue. All public funds come directly or indirectly from taxation. The expenditure of public money is of direct interest to all the people. Respecting all appropriations made by the legislative department of government the Governor may be held answerable on account either of his approval or of his veto.

Many statutes have been enacted which fix salaries of public officers or employees. The Governor for the time being may be held to a certain responsibility for these by reason of his duty of

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approval or disapproval. It would seem an incongruity to hold that the shifting of such responsibility from the Governor as an integral part of the executive department to an executive board of which he is one with eight others, was wrought without plain language expressive of such intent.

The words "Governor and Council" when used respecting many matters, indicate the single executive board composed of the Governor and the councillors. *Sparhawk* v. *Sparhawk*, 116 Mass. 315, 317. But as employed in the statute now under consideration touching the creation of that which may become in the nature of a fixed charge against the treasury of the Commonwealth, we incline to the view that they require separate approval by the Governor and also by the Council. Each must act independently of the other, and both must concur to effect the increase in salary.

ARTHUR P. RUGG.
JAMES M. MORTON.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.
CHARLES A. DECOURCY.

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INDEX.

ABSENTEE.

A trustee under a will and a guardian *ad litem* appointed to represent the absentee and others in proceedings under St. 1905, c. 326, for the appointment of trustees and the distribution of property held by the trustee under the will for a beneficiary who has been unheard of for more than fourteen years, have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution. *Adams* v. *Adams*, 198.

Such absentee proceedings are constitutional. *Ibid.*

Petition under R. L. c. 147, § 20, by the administrator of the estate of one unaccountably absent for more than seven years, for the liquidation and distribution of a trust fund created by deed. *Whitwell* v. *Bartlett*, 238.

ACCORD AND SATISFACTION.

In an action of tort for personal injuries against three defendants sued as joint tortfeasors, where it appeared that covenants not to sue had been given by the plaintiff to two of the defendants upon the receipt of certain sums of money from them, the question whether the plaintiff accepted the money so paid in full satisfaction of all injuries caused by the accident was held to have been one of fact for the jury on the evidence presented. *Matheson* v. *O'Kane*, 91.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

Defendant was held properly to have been tried at one time on two indictments, one under R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1, for enticing away a girl for the purpose of unlawful sexual intercourse, and the other under R. L. c. 212, § 10, for adultery after the enticement. *Commonwealth* v. *Rosenthal*, 50.

Evidence tending to show adultery of the defendant with the plaintiff's husband was held to have been admissible at the trial of an action by one woman against another for wrongfully enticing away the husband of the plaintiff, although adultery was not charged in the declaration. *Webber* v. *Benbow*, 366.

ADVERSE USE.

The acquisition by an adverse user extending from 1868 to 1908 of a right of way running longitudinally over and along a portion of land comprised in a

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location granted to a railroad corporation by county commissioners in 1845 is not prevented by St. 1861, c. 100, which has remained in force and now is contained in St. 1906, c. 463, Part II, § 80. *Hall* v. *Boston & Maine Railroad*, 174.

AGENCY.

Existence of Relation.

In an action for personal injuries caused by negligent operation of an automobile by the minor son of the defendant, a finding that the son was the servant of his father in the operation of the automobile was held to have been warranted by the evidence. *Smith* v. *Jordan*, 269.

Evidence at the trial of an action against the indorser of a promissory note, given by a corporation of which the defendant's son was the treasurer, and indorsed also by such son, was held to tend to show that the defendant's son, in negotiating for a renewal of the note and promising to bring a new note, was acting not only for himself but also as the authorized agent of the defendant, so that the question whether the defendant had waived demand and notice at or before the maturity of the note was for the jury. *Sweetser* v. *Jordan*, 393.

Circumstances under which the owner of eight houses placed them in the charge of a real estate agent, who had other houses in his charge, to care for them and to see that they were rented, were held to warrant findings that the real estate agent bore to the owner the relation of an agent and not that of an independent contractor, and that he had authority to employ a person to go with possible tenants to show them the premises. *Marston* v. *Reynolds*, 590.

Scope of Authority or Employment.

Agent of an insurance company, who fraudulently procured a prospective borrower from the company to indorse in blank a check of the company payable to the borrower's order, was held to have been acting within the scope of his authority. *Barry* v. *Mutual Life Ins. Co.* 306.

Action against a stockbroker by a customer for the amount of a dividend upon certain shares of stock which the defendant had sold with the "dividend on" after the dividend had been declared and before it was payable, in which material issues, upon which ample instructions were given to the jury, were, whether there was a custom of brokers that the broker had authority in such a case to sell with the "dividend on" and whether in order to carry out the plaintiff's instructions to sell the stock for the price named it was necessary to sell with the "dividend on." *Cronan* v. *Hornblower*, 538.

Evidence which was held to warrant a finding that an employee of the proprietor of a stable was acting within the scope of his employment when he ran into a customer in the stable yard. *Ryan* v. *Keane*, 543.

Circumstances under which the owner of eight houses placed them in charge of a real estate agent, who had other houses in his charge, to care for them and to see that they were rented, were held to warrant findings that the real estate agent bore to the owner the relation of an agent and not that of an independent contractor, and that he had authority to employ a person to go with possible tenants to show them the premises. *Marston* v. *Reynolds*, 590.

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Agent's Duty to Principal.

Suit in equity involving the right of an employee, who had not been employed to originate inventions, to use after his employment had terminated inventions made by him during its continuance, which effected an increase in the size and efficiency of machines which were the result of inventions that during his employment he had helped his employer to develop and which his employer had not patented but merely had kept secret. *American Stay Co.* v. *Delaney*, 229.

In a suit in equity to enjoin a former employee of the plaintiff from using knowledge of secret inventions of the plaintiff and to compel the defendant to account to the plaintiff because he had used a part of his working hours in the construction and equipment of a rival manufactory of his own, the injunction and the accounting prayed for were denied but the suit was retained for the assessment of such damages as the plaintiff had suffered by reason of the defendant's breach of contract in failing to devote the whole of his working hours to the duties of his employment. *Ibid.*

Agent's Commission.

In an action by a broker for a commission for procuring a purchaser for certain real estate of the defendant, if the plaintiff shows that he procured as a purchaser a person with whom the defendant made a contract in writing for the sale of the real estate in question, it is not necessary for the plaintiff to prove further that the proposed purchaser was able, ready and willing to perform his part of the contract. *Johnson* v. *Holland*, 363.

Liability of Principal for Agent's Fraud.

Suit in equity against an insurance company to compel the return to the plaintiff of his promissory note and an assignment of his policy, where it appeared that the defendant procured the note and assignment in a loan transaction which never was completed because an agent of the defendant, instead of delivering to the plaintiff a check for the amount of the loan, fraudulently procured the indorsement of the check in blank by the plaintiff and then absconded with its proceeds. *Barry* v. *Mutual Life Ins. Co.* 306.

Employer's Liability.

See that subtitle under NEGLIGENCE.

ALIENATION OF AFFECTIONS.

A declaration, in an action by one woman against another, which alleges that the defendant unlawfully gained the affections of the plaintiff's husband and enticed him to leave the home of the plaintiff and to continue absent from it, "whereby the plaintiff lost the comfort, society, aid, assistance and support of her said husband and his affection for the plaintiff was wholly alienated and destroyed," states a cause of action for loss of consortium. *Webber* v. *Benbow*, 366.

Evidence tending to show adultery of the defendant with the plaintiff's husband was held to be admissible at the trial of such a case. *Ibid.*

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ASSAULT AND BATTERY.

Action against the proprietor of a stable by a customer, for injuries resulting from a collision with a stable-man of the defendant in the stable yard, in which it was held that the plaintiff was entitled to go to the jury both on a count alleging negligence and on a count alleging an assault. *Ryan* v. *Keane*, 543.

At the trial of an action for an assault and battery, although it appears that no third person was present when the assault was committed, testimony by the plaintiff, that he felt humiliated on account of the assault and did not sleep at all the night following it, is admissible to show the extent of mental distress and injured feelings resulting from the assault, for which he is entitled to reasonable compensation. *Burns* v. *Jones*, 475.

Admission of testimony in such an action which, if assumed to have been error, was held not to have been prejudicial to the excepting party because the testimony was immaterial. *Ibid.*

ASSESSMENT.

See that subtitle under TAX.

ASSIGNMENT.

If a depositor in a savings bank delivers to another person his bank book and an order in writing on the bank to pay to such person the amount standing to the depositor's credit with the bank, a valid assignment and transfer of the deposit is effected and the transferee receives a complete title thereto which the bank is bound to recognize although the book and the order are presented two hours after the depositor's death and the bank has notice of the death. *Brannan* v. *Eliot Five Cents Savings Bank*, 532.

Of overdue mortgage, see *Gilfeather* v. *Cohen*, 119.

ATTORNEY AT LAW.

Right to Practise.

One, who, not having been admitted to practise as an attorney at law in this Commonwealth, but having a partner who is a member of the Massachusetts bar, performs services in violation of the prohibition of R. L. c. 165, § 45, cannot recover for such services, either alone or jointly with the other member of the firm. *Browne* v. *Phelps*, 376.

R. L. c. 165, § 45, providing for the punishment of one who falsely represents himself to be an attorney or counsellor at law "or to be lawfully qualified to practise in the courts of this Commonwealth," applies to such a representation made by a citizen of another State who is a member of the bar of that State but never has been admitted as a member of the bar of this Commonwealth, although he has practised here without objection. *Ibid.*

Where a party to a suit, believing that two persons in partnership are attorneys at law admitted to practise in this Commonwealth, employs them to represent him in court, and when asked in court who are his attorneys, being still in such belief, names both of them, this is not a "personal nomination in open court" within the meaning of R. L. c. 165, § 47, of one of the persons

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named, who has not been admitted to practise as an attorney in this Commonwealth, to conduct the case for him, at least as between the client and the person in question. *Brown* v. *Phelps*, 376.

Attorney's Lien.

R. L. c. 165, § 48, which gives to an attorney at law a lien for the amount of his fees and disbursements upon money collected by him on an execution in favor of a client, gives such attorney no lien for counsel fees for services. *Blake* v. *Corcoran*, 406.

In an action by a client against an attorney at law for money had and received, if it appears that the attorney retained from money collected on an execution, as compensation for his services, an amount in excess of the amount of the fees and disbursements, the burden of proof is on him to show that his claim for counsel fees is at least equal to the balance thus retained by him. *Ibid.*

Disbarment.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit, and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

AUTOMOBILE.

In an action for personal injuries caused by negligent operation of an automobile by the minor son of the defendant, a finding that the son was the servant of his father in the operation of the automobile was held to have been warranted by the evidence. *Smith* v. *Jordan*, 269.

Other actions for negligence in use of automobiles, see NEGLIGENCE, *In Use of Automobile.*

BANK AND BANKER.

In a suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator by checks payable to his own order which he deposited in his individual account with the defendant and used for his own purposes, the defendant was held to be liable to account to the plaintiff for the amount of checks so deposited out of the proceeds of which the defendant had reimbursed itself for overdrafts made by the dishonest administrator upon his individual account. *Allen* v. *Puritan Trust Co.* 409.

It seems, that a bank, in which an administrator has an account of the estate of his intestate and also an individual account, is not liable to the estate of the intestate for the amount of a check drawn by the administrator to his own order from funds of the estate of his intestate in another bank and dishonestly deposited in such individual account for his own use, if such check is presented in good faith by the bank in which it is deposited to the bank on which it is drawn and is paid without question. *Ibid.*

As to SAVINGS BANK, see that title.

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BANKRUPTCY.

Where a brother, who when insolvent received certain mortgages of real estate by inheritance from a sister who had refrained from making a will because he orally had promised her that he would distribute her estate in accordance with her wishes, executes the oral trust by transferring the property, a trustee in bankruptcy of his estate afterward appointed cannot follow such property, the statute of frauds not preventing the proof of the oral trust which had been fully executed. *Bailey* v. *Wood*, 37.

BAR ASSOCIATION.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

BASTARDY.

Certain bond given by the defendant in a bastardy process upon his release from arrest before the enactment of St. 1911, c. 53, amending R. L. c. 82, § 4, was held not to be good as a statutory bond and consequently not to be security for the performance by the defendant of an order of the Superior Court in the case after its transmission to that court, although it was good as a common law obligation. *Howe* v. *Grimes*, 33.

BETTERMENT.

See that subtitle under TAX.

BICYCLE.

See MOTOR CYCLE.

BILLS AND NOTES.

Delivery.

Where a lender of money, having received the note of an applicant for a loan, sends to an agent for delivery to the applicant a check payable to him for the amount of the loan, and the agent takes the check to the applicant and, holding it face downward, fraudulently induces him to indorse it under the belief that he is signing a voucher, and the agent cashes the check and absconds with the proceeds, the possession of the check never has passed to the applicant. *Barry* v. *Mutual Life Ins. Co.* 306.

Indorser for Accommodation.

In an action by the payee of a promissory note secured by a mortgage on real estate against the indorser of the note before delivery for a balance alleged to be due on the note after a foreclosure sale of the real estate, the facts, that the defendant paid interest on the note and collected the rents of the mortgaged property before the foreclosure sale, do not preclude him as a matter of law from establishing the defense that he indorsed the note for the plaintiff's accommodation and without consideration. *Nesson* v. *Millen*, 541.

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Waiver of Demand and Notice.

Evidence at the trial of an action against the indorser of a promissory note, given by a corporation of which the defendant's son was the treasurer, and indorsed also by such son, was held to tend to show that the defendant's son, in negotiating for a renewal of the note and promising to bring a new note was acting not only for himself but also as the authorized agent of the defendant, so that the question whether the defendant had waived demand and notice at or before the maturity of the note was for the jury. *Sweetser* v. *Jordan*, 393.

Payment.

Proper ordering of a verdict for the plaintiff in an action against the maker of a promissory note which, with a second note signed by another person, was secured by a single mortgage which had been foreclosed by a sale and the proceeds of the sale applied in full payment of the second note and in part payment of the note in suit. *Boston Safe Deposit & Trust Co.* v. *Manning*, 584.

Note in Settlement of Loan subject to Small Loans Act.

Borrower, who, without insisting upon his rights under R. L. c. 102, § 51, had settled a usurious loan of less than $500 by giving the lender a new note, was held not to be able to benefit by the provisions of the statute as to the new note. *Shawmut Commercial Paper Co.* v. *Brigham*, 72.

BOND.

In Bastardy Proceedings.

Certain bond given by the defendant in a bastardy process upon his release from arrest before the enactment of St. 1911, c. 53, amending R. L. c. 82, § 4, was held not to be good as a statutory bond and consequently not to be security for the performance by the defendant of an order of the Superior Court in the case after its transmission to that court, although it was good as a common law obligation. *Howe* v. *Grimes*, 33.

Replevin Bond.

At the trial of an action on a replevin bond where it appeared that the property replevied from the plaintiff had been attached by him as a deputy sheriff and consisted of scenery, costumes and theatrical properties then being used in a certain play, the presiding judge was held properly to have refused to rule that the jury could not consider what the value of the property was on the stage as used in the play and that its value was what it would bring at a sheriff's sale at the date of the final judgment. *Maguire* v. *Pan-American Amusement Co.* 22.

At a trial for the assessment of damages in an action by a deputy sheriff on a replevin bond, where it appeared that the property replevied from the plaintiff had been attached by him in a certain action, it was held that the writ, declaration, and execution in the action in which the attachment was made were not admissible as evidence. *Ibid.*

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Bond (*continued*).

Building Contractor's Bond.

In an action against the sureties on a bond of a building contractor, it was held that neither a certain payment by the owner to the contractor, nor the employment of the contractor as a superintendent in the completion of the contract for the owner after default by the contractor in any way released the sureties; and the expense for which the owner could have reimbursement under the provisions of the bond was determined. *Museum of Fine Arts* v. *American Bonding Co.* 124.

BOUNDARY.

In the construction of a certain deed of land bounding on the sea the word "beach" was given its ordinary meaning. *Castor* v. *Smith*, 473.

BOUNTY.

Certain proposed statute giving gratuities to certain veteran soldiers was held not to be a provision for a bounty or in equalization of bounties, and to be constitutional. *Opinion of the Justices*, 608.

BROKER.

In an action by a broker for a commission for procuring a purchaser for certain real estate of the defendant, if the plaintiff shows that he procured as a purchaser a person with whom the defendant made a contract in writing for the sale of the real estate in question, it is not necessary for the plaintiff to prove further that the proposed purchaser was able, ready and willing to perform his part of the contract. *Johnson* v. *Holland*, 363.

STOCKBROKER, see that title.

BUILDING LAWS.

Construction of R. L. c. 104, § 1, providing that any city, except Boston, which has accepted the provisions of that section, for the prevention of fire may make certain regulations regarding the construction and alteration and use of buildings and may prescribe penalties for violations of such regulations. *Commonwealth* v. *Hayden*, 296.

CARRIER.

Of Passengers.

It is the duty of a corporation operating passenger cars in a tunnel, not only to use care to see that its servants manage properly the machinery for closing the sliding doors of its cars by which its passengers enter, but also to use care to see that no stranger starts such machinery so as to cause injury to a passenger. *Craft* v. *Boston Elevated Railway*, 374.

Actions by passengers against street railway and railroad corporations for personal injuries, see NEGLIGENCE, *Street Railway*, Passenger; NEGLIGENCE, *Railroad*, Passenger.

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Of Goods.

A carrier having in his hands cases of goods lying on a wharf for the purpose of immediate transportation to their owner as consignee may be charged in trustee process as trustee of such owner. *Rosenbush* v. *Bernheimer*, 146.

A carrier may be charged in trustee process as the trustee of the owner of goods, which are in his hands for transportation to such owner as consignee, although when the writ was served the goods were packed in cases and the carrier knew of the contents of the cases only by information, if it appears that the goods were of value and belonged to the defendant. *Ibid.*

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier engaged in interstate commerce as the trustee of the owner of goods in the hands of the carrier for immediate transportation to another State, are not unconstitutional. *Ibid.*

CERTIORARI.

In certiorari proceedings against the mayor and the legislative bodies of a city to quash proceedings regarding the laying out of a way, it was held that an order of the legislative bodies laying out the way was not a matter "not admitting of delay" which, under R. L. c. 26, §§ 29, 30, the acting mayor would have had power to approve. *Dimick* v. *Barry*, 165.

In such proceedings it also was held that an error of the city authorities in accepting the approval of the acting mayor of such an order and in entering upon land for the purpose of constructing the way without procuring the approval of the mayor was substantial and not technical, that there was no unconscionable delay by the petitioner, and therefore that the writ should issue. *Ibid.*

CHARITY.

A charitable corporation owning a building, which lets a part of the building to a tenant for purposes entirely disconnected with those for which it was chartered, is not exempted from liability for an injury to a man in its employ caused by the negligence of its superintendent when the superintendent and the employee were engaged in doing work for the benefit of the tenant in accordance with the contract of the corporation with the tenant. *Holder* v. *Massachusetts Horticultural Society*, 370.

CHARTER PARTY.

In an action on a charter party containing provisions requiring the owner to clean the ship's bottom whenever the captain and charterer thought it necessary, where it did not appear that the charterer, who had full control of the vessel, ever gave the owner an opportunity to do such work, it was held that the failure of the owner to dry dock and clean the vessel was no ground of defense to the action. *Monsen* v. *American Importing & Transportation Co.* 387.

Where under a charter party the owner was to furnish a vessel with a full complement of officers and crew to be employed in the carriage of any "lawful merchandise, including petroleum and its products," between ports including the West Indies, a hurricane in the island of Jamaica which so de-

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Charter Party (*continued*).

vastated that island that no merchantable fruit could be obtained during the remainder of the charter period was held not to be an "act of God" excusing non-performance of the charter party. *Monsen* v. *American Importing & Transportation Co.* 387.

CHILD.

Discretion of a judge presiding at the trial of an indictment for murder in permitting a daughter of the defendant nine years and ten months of age to testify for the Commonwealth was held not to have been exercised improperly. *Commonwealth* v. *Marshall*, 86.

Negligence of a child, see NEGLIGENCE, *Of Child.*

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLERKS OF COURTS.

Under St. 1904, c. 451, § 6, a county treasurer has no authority to pay to the clerk of the courts of the county the amount of his travelling expenses incurred in going between the clerk's office and his house in another town, and the clerk has no right to receive such payment. Following Cook *v.* County of Norfolk, 201 Mass. 257. *County of Norfolk* v. *Cook*, 390.

COMPROMISE.

In a suit in equity by the trustees named in a will for instructions as to their duty under an agreement of compromise approved by the Probate Court in regard to selling certain securities of an estimated value of more than $6,000,000 and constituting more than half of the trust fund, where the trustees alleged that the compromise agreement had become unworkable, certain findings and rulings made and an interlocutory decree ordered by a single justice were held on an appeal by the defendants to have been proper. *Bartlett* v. *Slater*, 334.

Necessary parties to a compromise under R. L. c. 148, § 15; St. 1903, c. 222, of a controversy as to the allowance of a will. *Sherman* v. *Warren*, 288.

CONFLICT OF LAWS.

The law of Rhode Island with relation to mills and mill privileges is not material in determining what is the proper valuation for purposes of taxation in this Commonwealth of land in Massachusetts adjoining the boundary line of Rhode Island through which flows a river which is applied to wheels in Rhode Island. *Blackstone Manuf. Co.* v. *Blackstone*, 14.

Where at a trial there was evidence that the law of Connecticut required for the establishment of a public way by prescription fifteen years' uninterrupted use, but there was no further evidence of the law of Connecticut as to the nature of such use, it must be presumed that the common law of Connecticut is the same as that of this Commonwealth in requiring that the use should be adverse as well as continuous. *Jones* v. *New York, New Haven, & Hartford*, 521.

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CONSERVATOR.

The conservator of a feeble-minded person is not a proper party defendant in a suit in equity against a trustee of a fund placed in trust for the benefit of such person; but the feeble-minded person should be made a party defendant and the conservator on his own application then may be appointed guardian *ad litem*. *King* v. *Stowell*, 246.

CONSPIRACY.

At the trial of an indictment for conspiracy as in other trials the order in which evidence shall be allowed to be introduced is within the discretion of the presiding judge. *Commonwealth* v. *McKenzie*, 578.

An indictment against two defendants for conspiracy to steal money can be tried against one of the defendants alone in the absence of his alleged co-conspirator in parts unknown. *Ibid.*

Circumstances under which, at the trial of an indictment for conspiracy to steal money, testimony of the defendant, given before the grand jury when the transactions on which the indictment was based were the subject of inquiry, may be put in evidence against him. *Ibid.*

Circumstances under which, at the trial of one of two defendants indicted jointly for conspiracy to steal money, the other defendant being absent in parts unknown, the presiding judge may admit in evidence statements of the absent defendant not made in the presence of the defendant on trial. *Ibid.*

CONSTITUTIONAL LAW.

Impairment of Obligation of Contracts.

The statutes of this Commonwealth providing for the attachment of goods by trustee process cannot be held to violate the Constitution of the United States by affecting the performance of contracts for the carriage of goods entered into when those statutes long had been in force. *Rosenbush* v. *Bernheimer*, 146.

Due Process of Law.

St. 1905, c. 326, relating to proceedings for the disposition of the interest of a beneficiary under a trust created by a will who has been unheard of for more than fourteen years, is not in conflict with the Fourteenth Amendment of the Constitution of the United States or with any provision of the Constitution of this Commonwealth. *Adams* v. *Adams*, 198.

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier as the trustee of the owner of goods in his hands for transportation, are in accordance with the requirements of the Fourteenth Amendment of the Constitution of the United States as to due process of law. *Rosenbush* v. *Bernheimer*, 146.

Police Legislation.

A statute, forbidding any person engaged in the production or distribution of a commodity in general use to discriminate in the price of such commodity between different parts of the Commonwealth or between different pur-

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chasers either maliciously or for the purpose of destroying the business of a competitor and of creating a monopoly, and also prohibiting combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly, is within the police power of the Legislature. *Opinion of the Justices*, 620.

Interstate Commerce.

A statute requiring that all goods made by convict labor in a penal institution in this or any other State, before being sold in this Commonwealth, shall be marked in such a way as to indicate conspicuously the source of their manufacture, which by its terms plainly applies to interstate commerce, would be in violation of the Constitution of the United States, art. 1, § 8. *Opinion of the Justices*, 605.

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier engaged in interstate commerce as the trustee of the owner of goods in the hands of the carrier for immediate transportation to another State, are not in violation of the Constitution of the United States, art. 1, § 8. *Rosenbush* v. *Bernheimer*, 146.

A statute, forbidding any person engaged in the production or distribution of a commodity in general use to discriminate in the price of such commodity between different parts of the Commonwealth or between different purchasers either maliciously or for the purpose of destroying the business of a competitor and of creating a monopoly, and also prohibiting combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly, as it affects interstate commerce only indirectly, is not in violation of art. 1, § 8, of the Constitution of the United States. *Opinion of the Justices*, 620.

Right of One accused of Crime not to incriminate Himself.

Circumstances under which, at the trial of an indictment for conspiracy to steal money, testimony of the defendant given before the grand jury, when the transactions on which the indictment was based were the subject of inquiry, may be put in evidence against him. *Commonwealth* v. *MacKenzie*, 578.

Retroactive Legislation.

St. 1905, c. 326, relating to proceedings for the disposition of the interest of a beneficiary under a trust created by a will who has been unheard of for more than fourteen years, is not invalid by reason of the provision in § 10 that it shall apply to existing trusts. *Adams* v. *Adams*, 198.

Class Legislation.

A statute undertaking to exempt trade unions and associations of employers and their members and officials from liability for tortious acts committed by or on behalf of such a union or association would be unconstitutional. *Opinion of the Justices*, 618.

Section 8 of R. L. c. 91, as amended by St. 1906, c. 356, § 1, which gave to the commissioners on fisheries and game power to prohibit or regulate the dis-

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charge of sawdust from any particular sawmill under certain circumstances, was not unconstitutional as class legislation. *Lyman* v. *Commissioners on Fisheries & Game*, 10.

Public Use of Money.

Constitutionality of a statute providing for the payment of gratuities to veteran soldiers and sailors still living, who volunteered in the Civil War and served in the army and navy to the credit of the Commonwealth and were honorably discharged and received no bounty, such gratuity to be given as a testimonial for meritorious service for the purpose of promoting the spirit of loyalty and patriotism and not as a bounty or in equalization of bounties. *Opinion of the Justices*, 608.

The Legislature have no power to authorize the use of money of the Commonwealth, or of money deposited in the treasury of the Commonwealth by savings banks under St. 1908, c. 590, § 56, to purchase land and develop, build upon, rent, manage, sell and repurchase it, for the purpose of "providing homes for mechanics, laborers or other wage-earners," or "for the purpose of improving the public health by providing homes in the more thinly populated areas of the State for those who might otherwise live in the most congested areas of the State." *Opinion of the Justices*, 624.

Governor and Council.

Under St. 1909, c. 504, § 18, by which the trustees of a State institution covered by the provisions of that chapter are authorized to determine the salaries of all the officers of the institution, "subject to the approval of the Governor and Council," such approval must be given by the Governor and also by the Council, each acting independently of the other and not sitting together as a single executive board. *Opinion of the Justices*, 632.

Opinions of the Justices.

Whether under c. 3, art. 2 of the Constitution the Governor alone can require the opinions of the Justices in regard to a bill laid before him for his revisal under c. 1, § 1, art. 2 of the Constitution, was referred to as question left for future consideration. *Opinion of the Justices*, 620.

Without considering whether under c. 3, art. 2 of the Constitution the Council without the concurrence of the Governor may require the opinions of the Justices, the Justices declined to answer a question addressed to them by the Council where it did not appear to what, if any, pending matter the question related. *Answer of the Justices*, 630.

CONTRACT.

What constitutes.

A suit for specific performance of an alleged contract cannot be maintained where it appears that the alleged contract was executed and intended to be made with the defendant by the plaintiff's assignor when the defendant was led through fraud to believe that he was making an agreement with another corporation of the same name organized under the laws of a different State. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 398.

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Contract (*continued*).

The making of a contract of employment for one year at a certain salary of a marine superintendent of the business of a transportation corporation was held to be a part of the ordinary management of the corporation's business which could be delegated by the directors to an executive committee of three. *Young* v. *Canada, Atlantic & Plant Steamship Co.* 453.

Evidence which was held to warrant a finding that, after a subcontractor had refused to do further work in the construction of a building because of arrears in payments by the general contractor, the owner for a good consideration had made a promise, which was not within the statute of frauds, to assume the obligation of the general contractor with the subcontractor, and the subcontractor had agreed to the substitution. *McNulty* v. *Cruff*, 489.

Validity.

In an action of replevin for the possession of certain fish, the question, whether a sale of the fish on a Lord's day to the plaintiff by one of two partners who owned them was valid, was held not to be material where it appeared that the plaintiff relied, to prove his title, solely on a bill of sale given to him after the Lord's day by the other partner acting for the partnership. *Payne* v. *Dexter*, 1.

A suit for specific performance of an alleged contract cannot be maintained where it appears that the alleged contract was executed and intended to be made with the defendant by the plaintiff's assignor when the defendant was led through fraud to believe that he was making an agreement with another corporation of the same name organized under the laws of a different State. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 398.

One, who, not having been admitted to practise as an attorney at law in this Commonwealth, but having a partner who is a member of the Massachusetts bar, performs services in violation of the prohibition of R. L. c. 165, § 45, cannot recover for such services either alone or jointly with the other member of the firm. *Browne* v. *Phelps*, 376.

Construction.

Construction of a certain charter party, see *Monsen* v. *American Importing & Transportation Co.* 387.

Construction of certain provisions of a building contract, in an action against the sureties on the contractor's bond for damages resulting from a failure by the contractor to complete the contract. *Museum of Fine Arts* v. *American Bonding Co.* 124.

Construction of a contract and specifications for the building of a stable, which contained provisions intended by the owner to result in making the floor water-tight but no provision that the floor should be water-tight, was held to be a question of law for the court; and it was further held that under the provisions in question the contractor could not be held to guarantee that the mode of construction required of him would produce a water-tight floor. *Erickson* v. *George B. H. Macomber Co.* 311.

An agreement made on July 3, 1899, by the grantor in a deed of a lot of land "to pay any assessment which may lawfully be made under" a vote of the

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board of street commissioners of Boston in 1895 to widen and extend Huntington Avenue in accordance with the provisions of St. 1894, c. 416, "for payment of which any lien now exists on said lot," is not an agreement to pay an assessment for a betterment tax made under the provisions of St. 1902, c. 527, after assessments made for the work under St. 1894, c. 416, had been declared invalid. *Campbell* v. *Haven*, 121.

Construction of an indenture between the Old South Association and the trustees of the Old South Building Trust which in part provided that, if the "major part" of a grass plot beside the Old South Meeting House in Boston, over which the association had granted to the trust an easement of light and air, should be taken by the city of Boston, there should be a reasonable reduction of rent, a certain taking for an entrance to a subway being held not to be a taking of a "major part" of "the premises." *Old South Association* v. *Codman*, 211.

Implied.

In fact.

Where a contractor made a contract in writing with the owner of a ledge of rock to blast from the ledge such an amount of stone as the owner might desire, the owner agreeing to have one half of the rock removed before stopping the work, and the contractor removed one half of the rock and, acting as a reasonable man and under the supervision of an agent of the owner, continued at work and made preparations for the removal of the remainder of the rock, when the owner gave him notice to cease work, the contractor can recover on a contract implied in fact the value of the work done and materials furnished in preparation for the further blasting. *Rogers* v. *Becker-Brainard Milling Machine Co.* 559.

In a suit in equity for an accounting under an alleged agreement by the defendant to share the profits of an enterprise created and made a financial success by the joint efforts of the plaintiff and the defendant, it appeared that there was no agreement for the sharing of profits, but that the plaintiff's services were rendered at the request of the defendant and with the understanding that the defendant would pay for them if the enterprise was a financial success, and the plaintiff was allowed under the prayer in the bill for general relief to recover fair compensation for his services. *Casey* v. *May*, 243.

In law.

The rule, that money voluntarily paid by a person in his own behalf under no mistake as to the facts cannot be recovered back, does not apply to an action brought by a county to recover the amount of an unauthorized payment made in good faith by the county treasurer. *County of Norfolk* v. *Cook*, 390.

Building Contract.

Upon the construction of a contract and specifications for the building of a stable, which contained provisions intended by the owner to result in making the floor water-tight, but no provision that the floor should be water-tight, it was held that the contractor could not be held to guarantee that the mode of construction required of him would produce a water-tight floor. *Erickson* v. *George B. H. Macomber Co.* 311.

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Contract (*continued.*)

Action for alleged breaches by the contractor of a building contract containing provisions that the defendant should perform the work to the satisfaction of the plaintiff's architect and that payments should be made upon the architect's certificates, at the trial of which the jury in answer to special questions found a breach of the contract by the defendant resulting in damages to the plaintiff, and the judge erroneously ordered a verdict for the plaintiff without submitting to the jury evidence tending to show that, through approval of the work by the architect, the plaintiff had waived the breach. *Erickson* v. *George B. H. Macomber Co.* 311.

In an action against the sureties on a bond of a building contractor, it was held that neither a certain payment by the owner to the contractor nor the employment of the contractor as a superintendent in the completion of the contract for the owner after default by the contractor in any way released the sureties; and the expense for which the owner could have reimbursement under the provisions of the bond was determined. *Museum of Fine Arts* v. *American Bonding Co.* 124.

One to whom a second assignment of a mortgage of real estate was made after the mortgage note had become due was held to have, in a surplus left after a foreclosure of the mortgage by the first assignee, rights which were paramount to those of the mortgagor, although it appeared that the mortgagor had given the mortgage to a builder who had made with him a contract to construct a building on the land and to use the mortgage to raise funds for that purpose, and that the builder had failed to perform the contract. *Gilfeather* v. *Cohen*, 119.

Performance and Breach.

Suits in equity for the specific performance of contracts, see EQUITY JURISDICTION, *Specific Performance.*

In an action against the sureties on a bond of a building contractor, it was held that neither a certain payment by the owner to the contractor nor the employment of the contractor as a superintendent in the completion of the contract for the owner after default by the contractor in any way released the sureties; and the expense for which the owner could have reimbursement under the provisions of the bond was determined. *Museum of Fine Arts* v. *American Bonding Co.* 124.

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In an action by a broker for a commission for procuring a purchaser for certain real estate of the defendant, if the plaintiff shows that he procured as a purchaser a person with whom the defendant made a contract in writing for the sale of the real estate in question, it is not necessary for the plaintiff to prove further that the proposed purchaser was able, ready and willing to perform his part of the contract. *Johnson* v. *Holland*, 363.

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In an action on a charter party containing provisions requiring the owner to clean the ship's bottom whenever the captain and charterer thought it necessary, where it did not appear that the charterer, who had full control of the vessel, ever gave the owner an opportunity to do such work, it was held that the failure of the owner to dry dock and clean the vessel was no ground of defense to the action. *Monsen* v. *American Importing & Transporting Co.* 387.

The statutes of this Commonwealth providing for the attachment of goods by trustee process cannot be held to violate the Constitution of the United States by affecting the performance of contracts for the carriage of goods entered into when those statutes long had been in force. *Rosenbush* v. *Bernheimer,* 146.

CONVICT LABOR.

As to the constitutionality of a statute requiring the marking of all goods made by convict labor in any State and sold here, see *Opinion of the Justices,* 605.

CORPORATION.

Identity.

If a corporation conveys all its property and assets to a new corporation of the same name organized under the laws of a different State, which assumes all the liabilities of the first corporation, and if the new corporation has the same stockholders, officers and agents as the first one and carries on the same business at the same place in the same manner and under the same management, the two corporations have separate and distinct existences, being subject to different laws, and are not the same person at law or in equity. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association,* 398.

Powers.

The Lewis Wharf Company, created by St. 1834, c. 115, was held to have power to maintain a tenement house within territory designated in that statute. *Grella* v. *Lewis Wharf Co.* 54.

Officers and Agents.

The making of a contract of employment for one year at a certain salary of a marine superintendent of the business of a transportation corporation was held to be a part of the ordinary management of the corporation's business which could be delegated by the directors to an executive committee of three. *Young* v. *Canada, Atlantic & Plant Steamship Co., Ltd.* 453.

It also was held that the authority of the executive committee could be exercised by a majority of them even if the third member was not present when the vote was taken. *Ibid.*

Duties and liabilities of members of the investment committee of a savings bank in the Commonwealth. *Greenfield Savings Bank* v. *Abercrombie,* 252.

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Rights of Stockholders.

Minority stockholders of a certain corporation which had issued both common and preferred stock were held not to be entitled to maintain a suit in equity to enjoin the majority stockholders from carrying out a plan for a reduction and a new issue of common stock, although the result of the plan would be to diminish greatly the relative number of shares and the voting power of the complaining stockholders. *Page* v. *Whittenton Manuf. Co.* 424.

Transfer of Shares.

Effect and operation of a custom, that a certificate of shares in a corporation, accompanied by an instrument of power of transfer signed in blank by the person named in the certificate as the owner and in the possession of a person who is known and is of good reputation, "if the signature is guaranteed by a stock exchange house," is treated as "capable of good transfer and delivery by such holder" for sale or pledge. *Baker* v. *Davie*, 429.

Changes in Capital Stock.

Minority stockholders of a certain corporation which had issued both common and preferred stock were held not to be entitled to maintain a suit in equity to enjoin the majority stockholders from carrying out a plan for a reduction and a new issue of common stock, although the result of the plan would be to diminish greatly the relative number of shares and the voting power of the complaining stockholders. *Page* v. *Whittenton Manuf. Co.* 424.

MUNICIPAL CORPORATIONS, see that title.

COUNCIL.

See GOVERNOR AND COUNCIL.

COUNTY.

The rule, that money voluntarily paid by a person in his own behalf under no mistake as to the facts cannot be recovered back, does not apply to an action brought by a county to recover the amount of an unauthorized payment made in good faith by the county treasurer. *County of Norfolk* v. *Cook*, 390.

COUNTY COMMISSIONERS.

Under St. 1904, c. 451, § 6, providing for the allowance of certain travelling expenses of the clerks of courts by the respective counties in which such courts are established, "which expenses shall be audited by the county commissioners," the county commissioners have no jurisdiction to allow and approve a payment not authorized by the statute. *County of Norfolk* v. *Cook*, 390.

COVENANT.

In an action of tort against three joint tortfeasors, covenants not to sue given by the plaintiff to two of the three defendants do not release the third defendant from liability. *Matheson* v. *O'Kane*, 91.

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CUSTOM.

Effect and operation of a custom, that a certificate of shares in a corporation, accompanied by an instrument of power of transfer signed in blank by the person named in the certificate as the owner and in the possession of a person who is known and is of good reputation, "if the signature is guaranteed by a stock exchange house," is treated as "capable of good transfer and delivery by such holder" for sale or pledge. *Baker* v. *Davie*, 429.

Action against a stockbroker by a customer for the amount of a dividend upon certain shares of stock which the defendant had sold with the "dividend on" after the dividend had been declared and before it was payable, in which material issues, upon which ample instructions were given to the jury, were, whether there was a custom of brokers that the broker had authority in such a case to sell with the "dividend on," and whether in order to carry out the plaintiff's instructions to sell the stock for the price named it was necessary to sell with the "dividend on." *Cronan* v. *Hornblower*, 538.

DAMAGES.

For Property taken or injured under Statutory Authority.

Various rulings, which were held not to have been erroneous, at the trial of a petition for the assessment of damages alleged to have been suffered by a corporation, engaged in receiving, storing and selling coal on a wharf, by reason of the abolition of a grade crossing of a railroad and a highway. *Philadelphia & Reading Coal & Iron Co.* v. *Boston*, 526.

In Contract.

Determination of what items of damage were recoverable in an action against the sureties on the bond of a building contractor who had failed to complete the contract. *Museum of Fine Arts* v. *American Bonding Co.* 124.

In Tort.

In an action against a town under R. L. c. 51, § 18, for personal injuries caused by a defect in a public way, the amount of a reasonable bill for medical services required as a direct result of the injury may be recovered. *Barron* v. *Watertown*, 46.

A plaintiff in an action against a city under R. L. c. 51, § 18, for personal injuries caused by a defect in a highway is not entitled to have the jury instructed that in ascertaining damages they may add to what they consider to be a fair compensation to the plaintiff for the injuries he has suffered a further sum as interest due him by reason of the delay caused by his having to resort to an action to enforce his claim. *Cochran* v. *Boston*, 171.

At the trial of an action of tort for personal injuries by a woman who had been studying music with the intention of becoming a singer for hire and had received injuries which resulted in an impairment of her voice, the plaintiff may introduce evidence of her studies and intentions and of the injury to her voice, as bearing on the question of impairment of her earning capacity. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

And in such action the plaintiff may be allowed to show as special damages

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Damages (*continued*).

that by reason of her injury she was unable to keep an appointment to sing for which she was to have received pay. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

At the trial of an action for an assault and battery, although it appears that no third person was present when the assault was committed, testimony by the plaintiff, that he felt humiliated on account of the assault and did not sleep at all the night following it, is admissible to show the extent of mental distress and injured feelings resulting from the assault, for which he is entitled to reasonable compensation. *Burns* v. *Jones*, 475.

Proper rule for the assessment of damages in an action under St. 1906, c. 463, Part II, § 247, for damages resulting from fire communicated from a locomotive engine of a railroad corporation. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

In Action on Replevin Bond.

At the trial of an action on a replevin bond where it appeared that the property replevied from the plaintiff had been attached by him as a deputy sheriff and consisted of scenery, costumes and theatrical properties then being used in a certain play, the presiding judge was held properly to have refused to rule that the jury could not consider what the value of the property was on the stage as used in the play and that its value was what it would bring at a sheriff's sale at the date of the final judgment. *Maguire* v. *Pan-American Amusement Co.* 22.

In Suit in Equity.

Damages which may be recovered by the plaintiff in a suit to restrain unfair competition. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 219.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff as the foreman of a granite company, if it appears that the unlawful acts of the defendants caused the discharge of the plaintiff and made it impossible for him to procure employment, the plaintiff is entitled to recover damages not only for the loss of wages due to his discharge but also, once for all, for his present and prospective inability to procure employment, which may continue for an indefinite time, caused by the unlawful acts of the defendants. *Hanson* v. *Innis*, 301.

In a suit in equity to enjoin a former employee of the plaintiff from using knowledge of secret inventions of the plaintiff and to compel the defendant to account to the plaintiff because he had used a part of his working hours in the construction and equipment of a rival manufactory of his own, the injunction and the accounting prayed for were denied but the suit was retained for the assessment of such damages as the plaintiff had suffered by reason of the defendant's breach of contract in failing to devote the whole of his working hours to the duties of his employment. *American Stay Co.* v. *Delaney*, 229.

DANGEROUS ARTICLE OF MERCHANDISE.

Action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have resulted from an explosion of naphtha sold under an assumed name and sold negligently. *Gately* v. *Taylor*, 60.

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DEATH.

A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard of for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead," was held not to be such adjudication either of the fact or the date of the death as to render inadmissible evidence on those issues at a hearing upon a petition filed by the administrator for distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed. *Whitwell* v. *Bartlett*, 238.

Actions for injuries causing death, see NEGLIGENCE, *Causing Death.*

DECEIT.

An allegation in a declaration that the defendant falsely and fraudulently represented that she desired to purchase the plaintiff's lodging house business for $600, relying on which the plaintiff suffered loss, is too indefinite and too remote to sustain an action of deceit. *Gallagher* v. *Hussion*, 369.

Action of tort against a manufacturer for injuries to the plaintiff's wife and child caused by their using a preparation of malt purchased in a sealed bottle from a druggist to whom it had come through a wholesale dealer from the defendant, who had represented as of his own knowledge by public advertisements that it was a healthful mixture, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment. *Roberts* v. *Anheuser Busch Brewing Association*, 449.

DEED.

Construction.

In the construction of a deed conveying land to a railroad corporation and containing a granting clause and a habendum clause in the usual and proper terms to convey the land in fee and, after the description of the land, the following clause, "It is hereby intended to convey the above premises to the said railroad company to be used for a public road and depot and railroad purposes only," it was held that the land was conveyed to the railroad corporation unconditionally in fee simple, and did not revert when the corporation ceased to use it for railroad purposes. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

In the construction of a certain deed of land bounding on the sea the word "beach" was given its ordinary meaning. *Castor* v. *Smith*, 473.

Creation of Easement by Exception.

A provision in a deed of land for a right of way for the benefit of "the owners and their assigns" of an adjoining lot of land of the grantor, if the right of way is over a pathway referred to in the deed as an existing way, may operate as an exception and create an easement in fee without the use of the word "heirs." *Foster* v. *Smith*, 497.

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Reformation.

Reformation by a suit in equity of incorrect boundaries in a deed. *Holbrook* v. *Schofield*, 234.

Recording.

The fact, that a lease in writing for a term of twenty years, under which the petitioner in a petition against a city for the assessment of damages alleged to have been suffered by the abolition of a grade crossing of a railroad with a highway claimed title, was not recorded before the petition was filed, was held not to render the lease invalid as against the respondent or to prevent its being used for the purpose of increasing damages, where the lease was recorded before the completion of the trial. *Philadelphia & Reading Coal & Iron Co.* v. *Boston*, 526.

DEVISE AND LEGACY.

"Issue."

Word "issue" construed to mean "children." *Silsbee* v. *Silsbee*, 105.

Residuary Clause.

A bequest of a residue to one who was not a relative of the testatrix "to be used as far as necessary for the support" of an aunt of the testatrix, was held under the circumstances to be a bequest in trust, so that after the death of the aunt whatever remained of the trust fund should be disposed of as intestate property. *Woodbury* v. *Hayden*, 202.

Power.

Where a testator devised land to his three children as joint tenants with a remainder in fee to such of their children as should be living at the time of the death of his last surviving child, subject to a power in his children to convey "his, her or their interest in and to said real estate . . . to either one or more of the children of any of them," which conveyance so made should "vest in the grantee thereof a full and perfect title in fee simple, notwithstanding the above devise to [the testator's] children as joint tenants," an exercise of the power by the testator's last surviving child in favor of her child while children of the others of the testator's children were living was held to convey a title in fee simple to the whole of the land. *Foster* v. *Smith*, 497.

Trust.

As to trusts created by will, see TRUST.

DISBARMENT PROCEEDINGS.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

DIVORCE.

See MARRIAGE AND DIVORCE.

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EASEMENT.

Creation by Exception.

A provision in a deed of land for a right of way for the benefit of "the owners and their assigns" of an adjoining lot of land of the grantor, if the right of way is over a pathway referred to in the deed as an existing way, may operate as an exception and create an easement in fee without the use of the word "heirs." *Foster* v. *Smith*, 497.

Of Light and Air.

Construction of an indenture between the Old South Association and the trustees of the Old South Building Trust which in part provided that, if the "major part" of a grass plot beside the Old South Meeting House in Boston, over which the association had granted an easement of light and air, should be taken by the city of Boston, there should be a reasonable reduction of rent, a certain taking for an entrance to a subway being held not to be a taking of a "major part" of "the premises." *Old South Association* v. *Codman*, 211.

ELEVATOR.

Negligence in use of an elevator, see NEGLIGENCE, *In Use of Elevator.*

EMBEZZLEMENT.

The fact, that one of two partners in purchasing certain personal property for the partnership used funds which without the knowledge of his partner he had embezzled from a third person, was held not to be material on the question of the validity of a sale of the property by the innocent partner for the partnership. *Payne* v. *Dexter*, 1.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

ENTICING.

Defendant was held properly to have been tried at one time on two indictments, one under R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1, for enticing away a girl for the purpose of unlawful sexual intercourse, and the other under R. L. c. 212, § 10, for adultery after the enticement. *Commonwealth* v. *Rosenthal*, 50.

EQUITY JURISDICTION.

Plaintiff must have "Clean Hands."

In a suit in equity by a brother and a sister against their sister to set aside a deed made by the mother of all of the parties to the defendant because of undue influence of the defendant and the plaintiff sister acting in concert, it was held that under the circumstances the plaintiff sister did not come into court with clean hands and therefore should have no relief, although the plaintiff brother was given the relief he sought. *Lyons* v. *Elston*, 478.

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Laches.

It was held that under the circumstances a suit in equity for an accounting and the rectification of a mistake made in the adjusting of the affairs of a partnership by the formation of a corporation to succeed the partnership might be maintained six years after the adjustment. *Bowker* v. *Torrey*, 282.

Statute of Limitations.

A demurrer to a bill in equity setting forth a claim against an executor or administrator will not be sustained on the ground that the suit is barred by the special statute of limitations, R. L. c. 141, § 9, where it is not alleged in the bill that any notice of the defendant's appointment as required by R. L. c. 139, § 1, had been given by the executor. *Bowker* v. *Torrey*, 282.

It was held that under the circumstances a suit in equity for an accounting and the rectification of a mistake made in the adjusting of the affairs of a partnership by the formation of a corporation to succeed the partnership might be maintained six years after the adjustment. *Ibid.*

In a suit in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of St. 1894, c. 317, §§ 21, 24, the defendants stand in the relation of trustees toward the bank and its depositors, and consequently the statute of limitations begins to run against the bank only from the time that it learned of the defendants' wrongdoing. *Greenfield Savings Bank* v. *Abercrombie*, 252.

Res judicata.

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator. *Allen* v. *Puritan Trust Co.* 409.

Estoppel.

Acts of a defendant in a suit in equity for specific performance of a contract which tended to show that the defendant recognized the existence of the contract were held not to estop the defendant from relying on the defense that no contract existed, where it appeared that such acts were induced by fraud of the plaintiff. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 398.

The fact, that the plaintiff in a suit in equity incurred great expense because he relied on an expectation of both parties that certain things would be furnished by the defendant to the plaintiff upon terms mutually satisfactory in performance of a contract which the defendant was induced to make in a belief that he was contracting with a different person than the plaintiff, was held not to estop the defendant from maintaining the defense that no contract ever was made between the parties. *Ibid.*

Suit in equity for the determination of the rights of various persons in certain shares of stock in a corporation, where it appeared that the owner had placed

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his certificate of stock indorsed in blank in the hands of a stockbroker with an instrument of power of transfer, that the stockbroker dishonestly had delivered the certificate to a bank in pledge, that the owner by reason of a custom was estopped to deny the bank's title, and that thereafter the dishonest stockbroker had made various transfers to other persons of his "right, title and interest" in the shares subject to rights of the bank. *Baker* v. *Davie*, 429.

Negligence barring Suit.

Suit in equity to compel restitution of property of the plaintiff procured through fraud of an agent of the defendant, which was held not to have been barred by negligence of the plaintiff. *Barry* v. *Mutual Life Ins. Co.* 306.

Specific Performance.

A suit for specific performance of an alleged contract cannot be maintained where it appears that the alleged contract was executed and intended to be made with the defendant by the plaintiff's assignor, a corporation, when the defendant was led through fraud to believe that he was making an agreement with another corporation of the same name organized under the laws of a different State. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 398.

And acts of the defendant, based upon the same erroneous belief, recognizing the plaintiff as the assignee of the agreement and permitting the plaintiff to incur expense relying upon the validity of the agreement and in expectation of its fulfilment, do not estop the defendant from setting up the defense that he never made the alleged agreement with the plaintiff's assignor. *Ibid.*

Nor in such suit does the fact, that the plaintiff incurred great expense because he relied on an expectation of both parties that certain things would be furnished by the defendant to the plaintiff upon terms mutually satisfactory, estop the defendant from maintaining the defense that no contract ever was made between the parties. *Ibid.*

Enforcement of Implied Contract.

In a suit in equity for an accounting under an alleged agreement by the defendant to share the profits of an enterprise created and made a financial success by the joint efforts of the plaintiff and the defendant, it appeared that there was no agreement for the sharing of profits, but that the plaintiff's services were rendered at the request of the defendant and with the understanding that the defendant would pay for them if the enterprise was a financial success, and the plaintiff was allowed under the prayer in the bill for general relief to recover fair compensation for his services. *Casey* v. *May*, 243.

Bill or Petition for Instructions.

A petition in the Probate Court under R. L. c. 162, § 5, by a trustee for instructions regarding the trust, is a proceeding in equity and is governed by the rules of equity pleading and practice. *Burroughs* v. *Wellington*, 494.

In a suit for instructions by a trustee under a will, the trustee is entitled to instructions only as to his present duties. *Wheaton* v. *Batcheller*, 223.

In a suit in equity by the trustees named in a will for instructions as to their

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duty under an agreement of compromise approved by the Probate Court in regard to selling certain securities of an estimated value of more than $6,000,000 and constituting more than half of the trust fund, where the trustees alleged that the compromise agreement had become unworkable, certain findings and rulings made and an interlocutory decree ordered by a single justice were held on an appeal by the defendants to have been proper. *Bartlett* v. *Slater*, 334.

To correct Mistake.

Correction by a suit in equity of boundaries in a deed which by mistake of a scrivener were wrongly described. *Holbrook* v. *Schofield*, 234.

On demurrer it was held, that a bill in equity could not be maintained to change the character of an arrangement entered into six years before in entire good faith between a surviving partner and persons representing the interests of two deceased partners and a corporation formed to take over the partnership business and assets, or to give to the plaintiff, representing the interest of one of the deceased partners, a lien upon property into which the defendant, who represented the interest of the other deceased partner, had converted his interest in the real estate formerly of the partnership. *Bowker* v. *Torrey*, 282.

But it was held that the bill might be maintained for an accounting to rectify the mistake made by the parties and to compel such a readjustment, as between the parties in the suit, of the division of the shares of stock of the corporation at its par value, or in some other way, as would accomplish that end. *Ibid.*

In such a suit it was held that on the allegations of the bill the surviving partner and the corporation were not necessary parties. *Ibid.*

For an Accounting.

In a suit in equity for an accounting the trial judge, if he finds that the plaintiff is entitled to an accounting, also can find the amount due to the plaintiff without sending the case to a master. *McCarthy* v. *Gordon*, 115.

In a suit in equity for an accounting under an alleged agreement by the defendant to share the profits of an enterprise created and made a financial success by the joint efforts of the plaintiff and the defendant, it appeared that there was no agreement for a sharing of profits, but that the plaintiff's services were rendered at the request of the defendant and with the understanding that the defendant would pay for them if the enterprise was a financial success, and the plaintiff was allowed to recover a fair compensation for his services under the prayer in the bill for general relief. *Casey* v. *May*, 243.

Suit in equity for an accounting as to an adjustment of the affairs of a partnership which was made immediately after the death of one of the partners six years before the filing of the bill, and for the rectification of a mistake then made whereby the defendant received too much and the plaintiff received too little of the capital stock of a corporation which succeeded the partnership. *Bowker* v. *Torrey*, 282.

Such a suit may be maintained although six years have elapsed since the adjustment and the corporation has been doing business during that whole time and its capital stock has become or has been found to be of no value, if the mis-

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take was not discovered by the plaintiff until shortly before the suit was commenced. *Bowker* v. *Torrey*, 282.

In such a suit it was held that on the allegations of the bill the surviving partner and the corporation were not necessary parties. *Ibid.*

Marshalling.

In a suit in equity by the owner of certain shares of stock held by the defendant under a pledge from a dishonest stockbroker which the plaintiff is estopped to deny, if it appears that the broker who pledged the plaintiff's shares to the defendant also pledged to the defendant to secure the same indebtedness other shares of stock to which the broker had the title, the shares to which the broker had title should be resorted to first in satisfying the defendant's claim before applying the shares to which the plaintiff has the title subject to the pledge. *Baker* v. *Davie*, 429.

To recover Losses resulting from Improper Loans by Savings Bank.

Suit in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of the statutory requirements. *Greenfield Savings Bank* v. *Abercrombie*, 252.

In such a suit the defendants stand in the relation of trustees toward the bank and its depositors, and consequently the statute of limitations begins to run against the bank only from the time that it learned of the defendants' wrongdoing. *Ibid.*

To enforce Dedication of Land to Public Use.

Upon an information by the Attorney General against a land company and others to compel the keeping open of a certain parcel of land extending along the sea and overlooked from a part of the lots at a seashore resort, a general finding of the master that the plaintiff had failed to prove a dedication was held not to be inconsistent with any fact found by him, but on the contrary to have been supported by all the basic findings in the report. *Attorney General* v. *Vineyard Grove Co.* 596.

To enforce Pledge.

Suit in equity for the determination of the rights of various persons in certain shares of stock in a corporation, where it appeared that the owner had placed his certificate of stock indorsed in blank in the hands of a stockbroker with an instrument of power of transfer, that the stockbroker dishonestly had delivered the certificate to a bank in pledge, that the owner by reason of a custom was estopped to deny the bank's title and that thereafter the dishonest stockbroker had made various transfers to other persons of his "right, title and interest" in the shares subject to the right of the bank. *Baker* v. *Davie*, 429.

To enforce Rights of Minority Shareholders of Corporation.

Minority stockholders of a certain corporation which had issued both common and preferred stock were held not entitled to maintain a suit in equity to

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enjoin the majority stockholders from carrying out a plan for a reduction and a new issue of common stock, although the result of the plan would be to diminish greatly the relative number of shares and the voting power of the complaining stockholders. *Page* v. *Whittenton Manuf. Co.* 424.

To reform a Deed.

Statement of what would have been a proper disposition of a suit in equity for the reformation of two deeds of adjoining lots conveyed by the plaintiff to two of the defendants and of two mortgages given by one of the two defendants respectively to a third defendant and to the plaintiff, where the trial judge made a decree, dismissing the bill as to all defendants excepting one of the grantees of the plaintiff and ordering him to make such a conveyance as would correct his deed, and that defendant alone appealed. *Holbrook* v. *Schofield*, 234.

To relieve from Results of Fraud.

Suit in equity against an insurance company to compel the return to the plaintiff of his promissory note and an assignment of his policy, where it appeared that the defendant procured the note and assignment in a loan transaction which never was completed because an agent of the defendant, instead of delivering to the plaintiff a check for the amount of the loan, fraudulently procured the indorsement of the check in blank by the plaintiff and then absconded with its proceeds. *Barry* v. *Mutual Life Ins. Co.* 306.

To set aside Foreclosure Sale.

Where in a foreclosure sale of real estate under a power in a mortgage all the terms of the power and all the statutory requirements were complied with in good faith, the fact that the price obtained was inadequate does not require that a suit in equity to set aside the sale should be sustained. *Turansky* v. *Weinberg*, 324.

To set aside Deed procured by Undue Influence.

Findings of a master in a suit in equity by a brother and sister against their sister to set aside a deed of real estate made by the mother of all the parties to the defendant alone, that the defendant and the plaintiff sister "connived together to induce their mother to make a will in their favor to the exclusion of" the plaintiff brother, that the mother "was unduly influenced by them," and that, although of her own volition she suggested a deed instead of a will, she "was nevertheless affected" by such undue influence when she executed the deed, were held to be findings that the execution of the deed was procured by undue influence. *Lyons* v. *Elston*, 478.

In such a suit it was held that the fact, that the daughters were excluded from the room during a conference between an attorney and the mother when directions for making the deed were given, was not inconsistent with a finding that the deed was procured by undue influence of the daughters. *Ibid.*

In such a suit it also was held that the fact that the mother was "in full possession of all her mental faculties" was not inconsistent with such a finding. *Ibid.*

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In such a suit it was held that under the circumstances, although the plaintiff brother was entitled to a decree, the plaintiff sister did not come into court with clean hands and could not have the aid of a court of equity to relieve her from the harmful consequences of a wrong in which she participated. *Lyons* v. *Elston*, 478.

To enjoin Use of Business Secrets.

Suit in equity involving the right of an employee, who had not been employed to originate inventions, to use after his employment has terminated inventions made by him during its continuance giving greater size and efficiency to machines which had been the result of inventions that during his employment he had helped his employer to develop and which his employer had not patented but merely had kept secret. *American Stay Co.* v. *Delaney*, 229.

To restrain Unfair Competition.

Suit in equity by a manufacturer of toothpicks to restrain the defendant, a wholesale dealer in toothpicks, from selling goods in packages which the defendant, for the purpose of acquiring as far as possible the plaintiff's customers and trade, deliberately had made in imitation of a distinctive design which the plaintiff had established the exclusive right to use in his business. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 219.

In such a suit it was held that it was immaterial that an immediate purchaser from the defendant was not deceived as to the identity of the goods, and that the plaintiff need not show that specific buyers from such purchaser were deceived or that the defendant intended to deceive the public. *Ibid.*

In such suit it also was held that the defendant might be liable not only for the damage suffered by the plaintiff but also to account to the plaintiff for any profits which might have accrued to the defendant from his use of the imitation. *Ibid.*

Unlawful Strike.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff by means of an unlawful strike which compelled the plaintiff's superior to leave the question of the plaintiff's discharge to a vote of the workmen, a majority of whom voted for his discharge, the plaintiff is entitled to relief against the defendants who instigated and maintained the strike and not merely against those workmen who voted for his discharge. *Hanson* v. *Innis*, 301.

In such a suit the plaintiff was held to be entitled to recover damages not only for the loss of wages due to his discharge but also, once for all, for his present and prospective inability to procure employment, which might continue for an indefinite time, caused by the unlawful acts of the defendants. *Ibid.*

To reach and apply Equitable Assets.

Money in the custody of a clerk of court, which was paid into court under R. L. c. 173, § 37, by the defendant in an action of law not brought for the benefit of creditors, to which the plaintiff in that action is entitled and which belongs to her husband, cannot be reached and applied by a creditor of

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such husband in a suit in equity under R. L. c. 159, § 3, cl. 7. *Berlin Mills Co.* v. *Lowe*, 28.

To reach Income of Trust Fund for Payment of Debt due from Trust Estate.

Caretaker of a feeble-minded daughter of a testator whose will had created a trust for the daughter's maintenance was allowed to maintain a suit in equity against the successor of a trustee, to whom she had rendered services and advanced money for the purposes of the trust, to have her claim established, to have it ascertained whether there were funds in the hands of the trustee as accumulated and unexpended income which could be applied to the payment of her claim, and to have orders made for such payment in accordance with the facts found to exist. *King* v. *Stowell*, 246.

To follow Embezzled Funds.

Suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator by checks payable to his own order which he deposited in his individual account with the defendant and used for his own purposes. *Allen* v. *Puritan Trust Co.* 409.

On facts found by a master in such suit it was held that the defendant was liable to account to the plaintiff for the whole amount of checks deposited by the dishonest administrator in his individual account out of which the defendant reimbursed itself for overdrafts made by him upon his individual account. *Ibid.*

But that the defendant was not liable for the amounts of other like checks deposited subsequently by the administrator in his individual account and credited to him by the defendant when there were no overdrafts and the defendant had no actual knowledge or suspicion of the administrator's wrongdoing. *Ibid.*

In such a suit it was held under the circumstances to be no defense that the surety on the bond of the dishonest administrator negligently failed to require him to perform his duties as administrator. *Ibid.*

And it was held to be immaterial that the plaintiff had brought suit against the surety, that the surety had paid to the plaintiff the penal sum of the bond, and that the plaintiff and the surety had made an agreement that the surety might sue the defendant in the name of the plaintiff, the surety bearing the expenses of the suit, and that any amount recovered should be divided equally between them. *Ibid.*

And it also was held under the circumstances to be no defense that the intestate's next of kin had not made any attempt to keep track of the dishonest administrator or to compel him to account. *Ibid.*

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator. *Ibid.*

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Damages.

Damages in a suit by a manufacturer of toothpicks to restrain the unlawful use of a deliberate imitation of a package of distinctive size and shape and design adopted by the plaintiff. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 219.

Damages awarded in a suit in equity to enjoin an unlawful strike. *Hanson* v. *Innis*, 301.

Damages allowed in a suit in equity against a former employee of the plaintiff for improper use for his own benefit of time for which he was paid by the plaintiff. *American Stay Co.* v. *Delaney*, 229.

EQUITY PLEADING AND PRACTICE.

Parties.

The conservator of a feeble-minded person is not a proper party defendant in a suit in equity against a trustee of a fund placed in trust for the benefit of such person; but the feeble-minded person should be made a party defendant and the conservator on his own application then may be appointed guardian *ad litem*. *King* v. *Stowell*, 246.

In a suit in equity for an accounting to rectify a mistake made in the adjusting of the affairs of a partnership composed of three partners after the death of two of the partners by the formation of a corporation and the payment in capital stock of the corporation of amounts found to be due to persons representing the interests of the former partners, where the plaintiff represented the interest of one of the deceased partners and the defendant that of the other deceased partner, it was held on demurrer to the bill that the surviving partner and the corporation were not necessary parties. *Bowker* v. *Torrey*, 282.

In a suit in equity against the officers and members of an unincorporated labor union for causing the discharge of the plaintiff by means of an unlawful strike which compelled the plaintiff's superior to leave the question of the plaintiff's discharge to a vote of the workmen, a majority of whom voted for his discharge, the plaintiff is entitled to relief against the defendants who instigated and maintained the strike and not merely against those workmen who voted for his discharge. *Hanson* v. *Innis*, 301.

Bill.

A demurrer to a bill in equity setting forth a claim against an executor or administrator will not be sustained on the ground that the suit is barred by the special statute of limitations, R. L. c. 141, § 9, where it is not alleged in the bill that any notice of the defendant's appointment as required by R. L. c. 139, § 1, had been given by the executor. *Bowker* v. *Torrey*, 282.

In a suit in equity for an accounting under an alleged agreement by the defendant to share the profits of an enterprise created and made a financial success by the joint efforts of the plaintiff and the defendant, it appeared that there was no agreement for the sharing of profits, but that the plaintiff's services were rendered at the request of the defendant and with the understanding that the defendant would pay for them if the enterprise were a financial success, and the plaintiff was allowed under the prayer in the bill for general relief to recover fair compensation for his services. *Casey* v. *May*, 243.

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In a bill in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of St. 1894, c. 317, §§ 21, 24, certain allegations, which were not essential to the liability of the defendants and merely set forth the circumstances in the light of which their conduct was to be judged, were held to be in no way repugnant to the ground for relief stated by the bill. *Greenfield Savings Bank* v. *Abercrombie*, 252.

Demurrer.

A demurrer to a bill in equity setting forth a claim against an executor or administrator will not be sustained on the ground that the suit is barred by the special statute of limitations, R. L. c. 141, § 9, where it is not alleged in the bill that any notice of the defendant's appointment as required by R. L. c. 139, § 1, had been given by the executor. *Bowker* v. *Torrey*, 282.

Answer.

On an appeal in a suit in equity it was held that a motion made by the defendants to strike from their answer an admission as to a material issue was denied rightly within the discretion of the single justice who heard the case, and that, because of a certain finding of fact by the justice, the defendants were not harmed by the denial of the motion. *Bartlett* v. *Slater*, 334.

Cross Bill.

Proper disposition of a suit for the reformation of certain deeds by directing among other things that one of the defendants should file such a cross bill as would enable him to acquire a clear title to a portion of the premises omitted from a deed given to him by the plaintiff. *Holbrook* v. *Schofield*, 234.

Amendment.

Of bill.

After the allowance of an amendment to a bill in equity adding allegations which were unnecessary to give the plaintiff relief, it is within the discretionary power of the court to recommit the case to a master although the issues added by the amendment already have been heard by him and findings made thereon. *Casey* v. *May*, 243.

Of answer.

On an appeal in a suit in equity it was held that a motion made by the defendants to strike from their answer an admission as to a material issue was denied rightly within the discretion of the single justice who heard the case, and that, because of a certain finding of fact by the justice, the defendants were not harmed by the denial of the motion. *Bartlett* v. *Slater*, 334.

Petition in Probate Court for Instructions.

A petition in the Probate Court under R. L. c. 162, § 5, by a trustee for instructions regarding the trust, is a proceeding in equity and is governed by the rules of equity pleading and practice. *Burroughs* v. *Wellington*, 494.

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Hearing together of Motions and Petitions.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities forming a part of the trust property, where a petition was pending for the removal of the trustees, it was held, that it could not be said that the single justice who heard the case exercised his discretion wrongly in declining to hear the petition for the removal of the trustees with the bill for instructions. *Bartlett* v. *Slater*, 334.

Master.

When reference is necessary.

In a suit in equity for an accounting the trial judge, if he finds that the plaintiff is entitled to an accounting, also can find the amount due to the plaintiff without sending the case to a master. *McCarthy* v. *Gordon*, 115.

Construction of report.

Where the master to whom a suit in equity was referred was a trained lawyer of large experience, no longer living, the language of his report, when reasonably susceptible of such interpretation, should be construed so as to accomplish the end of deciding the point at issue before him. *Lyons* v. *Elston*, 478.

Upon an information by the Attorney General against a land company and others to compel the keeping open of a certain parcel of land extending along the sea and overlooked from a part of the lots at a seashore resort, a general finding of a master that the plaintiff had failed to prove a dedication was held not to be inconsistent with any fact found by him, but on the contrary to have been supported by all the basic findings in the report. *Attorney General* v. *Vineyard Grove Co.* 596.

Exceptions to report.

An exception to a general finding of a master in his report which related only to a single question cannot be sustained upon a ground which had no reference to that question. *Attorney General* v. *Vineyard Grove Co.* 596.

An exception to a master's report in a suit in equity founded on the failure of the master to make a certain finding cannot be sustained when the evidence to which the exception relates is not before the court. *Ibid.*

Where a suit in equity has been referred to a master under an order which directs him to report "so much of the evidence as he may deem necessary," an exception to his report on the ground of his failure to report certain evidence cannot be sustained. *Ibid.*

Motion to recommit report.

After the allowance of an amendment to a bill in equity adding allegations which were unnecessary to give the plaintiff relief, it is within the discretionary power of the court to recommit the case to a master although the issues added by the amendment already have been heard by him and findings made thereon. *Casey* v. *May*, 243.

A motion in a suit in equity to recommit the case to a master, for the purpose of determining a question suggested by a certain finding in the master's report but having no bearing on the principal question raised by the pleadings and tried before the master or upon the finding of the master on that

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question, properly may be denied by the trial judge in the exercise of his discretion. *Attorney General* v. *Vineyard Grove Co.* 596.

Where a suit in equity was referred to a master under an order directing him to report "so much of the evidence as he may deem necessary" a motion to recommit the case to the master for the purpose of reporting certain testimony is addressed to the discretion of the trial judge, which was held to have been exercised rightly in denying the motion, see *Ibid.*

Memorandum.

Upon an appeal from a final decree dismissing a bill in equity, a memorandum previously made by the trial judge in granting an interlocutory motion to dissolve a temporary injunction does not affect the final decree appealed from. *Reade* v. *Woburn National Bank*, 320.

When a final decree in a suit in equity has been entered and an appeal has been taken, the case cannot be reported for determination by this court with or without a report under R. L. c. 159, § 23, by the justice who made the report, not of the case, but only of the material facts found by him. *Bartlett* v. *Slater*, 334.

Decree.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities constituting more than half of the trust fund, a decree made by a single justice, authorizing a sale at a fair price but ordering "that the terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a single justice of this court," is not a final decree, and under R. L. c. 159, § 27, may be reported as an interlocutory decree for determination by this court. *Ibid.*

A provision cannot be inserted in an interlocutory decree in a suit in equity to the effect that certain matters left undetermined thereby shall be determined finally and without right of appeal by a decree of a single justice, because a single justice would have no jurisdiction to make a decree either interlocutory or final from which an appeal could not be taken. *Ibid.*

Statement of what would have been a proper disposition of a suit in equity for the reformation of two deeds of adjoining lots conveyed by the plaintiff to two of the defendants and of two mortgages given by one of the two defendants respectively to a third defendant and to the plaintiff, where the trial judge made a decree, dismissing the bill as to all defendants excepting one of the grantees of the plaintiff and ordering him to make such conveyances as would correct his deed, and that defendant alone appealed. *Holbrook* v. *Schofield*, 234.

When a final decree in a suit in equity has been entered formally and an appeal has been taken, the case cannot be reported for determination by this court, and the appeal comes before this court with or without a report under R. L. c. 159, § 23, by the justice who made the decree, not of the case, but only of the material facts found by him. *Bartlett* v. *Slater*, 334.

Dismissal without prejudice of a bill in equity which was held to have been improper because previously thereto with the consent of the parties an interlocutory decree had been made under which the plaintiff had given up valuable securities and had taken a bond. *Steeves* v. *Bowen*, 116.

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In a suit in equity by a brother and a sister against their sister to set aside a deed made by the mother of all the parties to the defendant because of undue influence of the defendant and the plaintiff sister acting in concert, it was held that under the circumstances the plaintiff sister did not come into court with clean hands and therefore should have no relief, although the plaintiff brother was given the relief he sought. *Lyons* v. *Elston*, 478.

Dismissal of Bill.

After a suit in equity has proceeded to a final hearing before a master, who has submitted to the counsel a draft report containing findings in favor of the defendant, the plaintiff has no right, against the objection of the defendant, to have his bill dismissed on payment of costs. *Kyle* v. *Reynolds*, 110.

Dismissal without prejudice of a bill in equity which was held to have been improper because previously thereto with the consent of the parties an interlocutory decree had been made under which the plaintiff had given up valuable securities and had taken a bond. *Steeves* v. *Bowen*, 116.

Withdrawal of Petition for Instructions.

Where, after all parties interested have appeared and answered to a petition in the Probate Court by a trustee for instructions regarding the trust, a hearing has been had and a decree is ready for signature but has not been entered, the trustee files a motion "to dismiss" or for leave to withdraw the petition, the judge within his discretion may deny the motion and an appeal from such action is without merit. *Burroughs* v. *Wellington*, 494.

Report.

When a final decree in a suit in equity has been entered formally and an appeal has been taken, the case cannot be reported for determination by this court. *Bartlett* v. *Slater*, 334.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court, in regard to selling certain securities constituting more than half of the trust fund, a decree made by a single justice, authorizing a sale at a fair price but ordering "that the terms of such sale and the adequacy of such price shall be submitted and subject to the approval of a single justice of this court," is not a final decree, and under R. L. c. 159, § 27, may be reported as an interlocutory decree for the determination of this court. *Ibid.*

Exceptions.

Exceptions to the dismissal of a petition filed in the Supreme Judicial Court and entitled a "petition to vacate a judgment decree of the Probate Court for suitable maintenance" were overruled and, on an appeal from a decree dismissing the petition, the decree was affirmed. *Cogan* v. *Cogan*, 290.

Appeal.

Upon an appeal by the plaintiff in a suit in equity from a final decree dismissing the bill, it is open to the defendant to contend that upon certain facts shown by the master's report the plaintiff is not entitled to prevail, although

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the defendant did not appeal from an order in the final decree overruling an exception by him to the master's report based on such defense. *Lyons* v. *Elston*, 478.

Statement of what would have been a proper disposition of a suit in equity for the reformation of two deeds of adjoining lots conveyed by the plaintiff to two of the defendants and of two mortgages given by one of the two defendants respectively to a third defendant and to the plaintiff, where the trial judge made a decree, dismissing the bill as to all defendants excepting one of the grantees of the plaintiff and ordering him to make such conveyances as would correct his deed, and that defendant alone appealed. *Holbrook* v. *Schofield*, 234.

A provision cannot be inserted in an interlocutory decree in a suit in equity to the effect that certain matters left undetermined thereby shall be determined finally and without right of appeal by a decree of a single justice, because a single justice would have no jurisdiction to make a decree either interlocutory or final from which an appeal could not be taken. *Bartlett* v. *Slater*, 334.

On an appeal in a suit in equity it was held that a motion made by the defendants to strike from their answer an admission as to a material issue was denied rightly within the discretion of the single justice who heard the case, and that because of a certain finding of fact by the justice the defendants were not harmed by the denial of the motion. *Ibid.*

When a final decree in a suit in equity has been entered and an appeal has been taken, the case cannot be reported for determination by this court, and the appeal comes before this court with or without a report under R. L. c. 159, § 23, not of the case, but only of the material facts found by the justice who made the decree. *Ibid.*

In a suit in equity by the trustees named in a will for instructions as to their duty under an agreement of compromise approved by the Probate Court in regard to selling certain securities of an estimated value of more than $6,000,000 and constituting more than half of the trust fund, where the trustees alleged that the compromise agreement had become unworkable, certain findings and rulings made and an interlocutory decree ordered by a single justice were held on an appeal by the defendants to have been proper. *Ibid.*

Exceptions to the dismissal of a petition filed in the Supreme Judicial Court and entitled a "petition to vacate a judgment decree of the Probate Court for suitable maintenance" were overruled and, on an appeal from a decree dismissing the petition, the decree was affirmed. *Cogan* v. *Cogan*, 290.

An appeal by the defendant in a suit in equity from a final decree for the plaintiff, entered after a rescript had been issued by this court overruling the defendant's exceptions to the rulings of the trial judge, was overruled because it appeared from a voluminous report of all the evidence that the judge's findings of fact and final decree were fully warranted. *Malden & Melrose Gas Light Co.* v. *Chandler*, 226.

ESTOPPEL.

The mere fact, that, previous to the execution of a bill of sale of certain personal property by one of two partners purporting to act for the partnership, a representative of the vendee, being informed that the other partner

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denied the existence of the partnership, had caused the property to be attached as such other partner's individual property, was held not to estop the vendee from denying that the property belonged solely to such partner. *Payne* v. *Dexter*, 1.
See also EQUITY JURISDICTION, *Estoppel*.

EVIDENCE.

Judicial Notice.

Judicial notice was taken of the fact that cars in the Boston subway stop only at fixed stations. *Bursteen* v. *Boston Elevated Railway*, 459.

Presumptions and Burden of Proof.

Instructions by a trial judge to a jury which, it was held, must be presumed to have been followed. *Maguire* v. *Pan-American Amusement Co.* 22.
Where at a trial there was evidence that the law of Connecticut required for the establishment of a public way by prescription fifteen years' uninterrupted use, but there was no further evidence of the law of Connecticut as to the nature of such use, it must be presumed that the common law of Connecticut is the same as that of this Commonwealth in requiring that the use should be adverse as well as continuous. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.
A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard of for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead," was held not to be such adjudication either of the fact or of the date of the death as to render inadmissible evidence on those issues at a hearing upon a petition filed by the administrator for distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed. *Whitwell* v. *Bartlett*, 238.
Applications of the doctrine of *res ipsa loquitur*, see NEGLIGENCE, *Res ipsa loquitur*.
Illustrations given by DECOURCY, J., of cases where the rule of evidence requiring proof beyond a reasonable doubt in criminal proceedings does not apply to civil actions which are penal in their nature. *Grella* v. *Lewis Wharf Co.* 54.
In an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing death by negligence, the plaintiff sustains the burden of proof by proving his case by a preponderance of the evidence. *Ibid.*
Certain instructions by a judge to a jury as to the weight to be given to the report of an auditor who under an order of the court had heard a case *ex parte*, which were held to be correct. *Payne* v. *Dexter*, 1.
Auditor's report, finding for the plaintiff in the first of four actions of replevin which were tried together, was held not to warrant the ordering of a verdict in that action for the plaintiff where there was evidence at the trial on issues in the other three actions tending to control the auditor's findings. *Ibid.*
In an action by a client against an attorney at law for money had and received, if it appears that the attorney retained from money collected on the execution, as compensation for his services, an amount in excess of the amount of the fees and disbursements, the burden of proof is on him to show that his

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claim for counsel fees is at least equal to the balance thus retained by him. *Blake* v. *Corcoran*, 406.

Although some of several witnesses for the plaintiff at the trial of an action stated in cross-examination that their testimony in direct examination was not in accordance with the facts and also stated facts favoring the defendant, the presiding judge was held rightly to have refused to rule that the jury would not be warranted in finding the defendant liable upon such witnesses' testimony. *Jones* v. *Boston & Northern Street Railway*, 552.

Proper ordering of a verdict for the plaintiff in an action against the maker of a promissory note which, with a second note signed by another person, was secured by a single mortgage which had been foreclosed by a sale and the proceeds of the sale applied in full payment of the second note and in part payment of the note in suit. *Boston Safe Deposit & Trust Co.* v. *Manning*, 584.

Admissions and Confessions.

Where in an action of contract the defendant is called by the plaintiff as a witness, he may be asked about his testimony at another trial, irrespective of the question whether such evidence is contradictory to his present testimony, if such previous testimony is an admission of a material fact. *Sweetser* v. *Jordan*, 393.

Circumstances under which, at the trial of an indictment for conspiracy to steal money, testimony of the defendant given before the grand jury when the transactions on which the indictment was based were the subject of inquiry may be put in evidence against him. *Commonwealth* v. *MacKenzie*, 578.

Statements of Co-conspirator.

Circumstances under which, at the trial of one of two defendants indicted jointly for conspiracy to steal money, the other defendant being absent in parts unknown, the presiding judge may admit in evidence statements of the absent defendant not made in the presence of the defendant on trial. *Commonwealth* v. *MacKenzie*, 578.

Competency.

The question, whether a judgment dismissing a libel for divorce is a bar to the admission in evidence, at the trial of a libel subsequently filed by the same libellant against the same libellee, of certain matters testified to at the hearing of the former libel, was referred to but was not decided in *Newman* v. *Newman*, 508.

At the trial of a case before a judge without a jury the admission of incompetent evidence, which the judge states that he afterwards disregarded in his findings of fact, is not to be commended. *Ibid.*

At the trial of an action for injuries caused by a collision of a street car with a motor cycle which the plaintiff was riding, it was held that under the circumstances the plaintiff properly was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Robinson* v. *Springfield Street Railway*, 483.

At the trial of an action against a railroad corporation under St. 1906, c. 463, Part II, § 247, for damages resulting from the burning of a wooden building and certain shade trees of the plaintiff by fire communicated by a locomotive

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engine of the defendant, where the defendant moved to strike out the answer to a question asked of the plaintiff by his counsel without objection, the motion properly was denied because the question was asked without objection and the answer was responsive. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

Relevancy and Materiality.

Evidence tending to show adultery of the defendant with the plaintiff's husband was held to have been admissible at the trial of an action by one woman against another for wrongfully enticing away the husband of the plaintiff, although adultery was not charged in the declaration. *Webber* v. *Benbow*, 366.

In an action by a woman passenger against a street railway company for injuries sustained, when the plaintiff was alighting from the front platform of a vestibule car of the defendant, by reason of the bottom of the plaintiff's dress catching on the sand-plunger, it was held that a witness, who testified that in releasing the plaintiff's dress she did not pull up the pin, also properly was allowed to testify that immediately after the accident the motorman pressed the sand-plunger down. *Martin* v. *Old Colony Street Railway*, 535.

At the trial of an action for an assault and battery, although it appears that no third person was present when the assault was committed, testimony by the plaintiff, that he felt humiliated on account of the assault and did not sleep at all the night following it, is admissible to show the extent of mental distress and injured feelings resulting from the assault, for which he is entitled to reasonable compensation. *Burns* v. *Jones*, 475.

Admission of testimony in such an action which, if assumed to have been error, was held not to have been prejudicial to the excepting party because the testimony was immaterial. *Ibid.*

Evidence of the length of time that a motorman has been in the employ of a street railway company and of the amount of instruction he has received was held to be immaterial and inadmissible, at the trial of an action against the company for personal injuries, upon the questions of what the motorman did and whether what he did was negligent. *Lang* v. *Boston Elevated Railway*, 492.

In an action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have been suffered from an explosion of naphtha sold in a compound under an assumed name and sold negligently, evidence offered by the defendant, to show that the compound sold was an article generally sold in the market before as well as after the injury to the plaintiff, is immaterial. *Gately* v. *Taylor*, 60.

In an action under R. L. c. 185, § 7, for three times the damages alleged to have been caused by the defendant wilfully cutting down trees on the plaintiff's land without license and with no good reason to believe that the land was his own or that his acts were authorized, evidence offered by the defendant to show that when he cut the trees he believed he had a right to do so was excluded properly. *Palmer* v. *Davidson*, 556.

At the trial for the assessment of damages in an action by a deputy sheriff on a replevin bond, where it appeared that the property replevied from the plaintiff had been attached by him in a certain action, the writ, declara-

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tion, and execution in the action in which the attachment was made were held not to have been admissible as evidence. *Maguire* v. *Pan-American Amusement Co.* 22.

Opinion.

At the trial of an action for injuries caused by a collision of a street car with a motor cycle which the plaintiff was riding, it was held that under the circumstances the plaintiff properly was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Robinson* v. *Springfield Street Railway*, 483.

Testimony at Previous Trial.

Where in an action of contract the defendant is called by the plaintiff as a witness, he may be asked about his testimony at another trial, irrespective of the question whether such evidence is contradictory to his present testimony, if such previous testimony is an admission of a material fact. *Sweetser* v. *Jordan*, 393.

Corroboration.

A witness, who had testified for the Commonwealth at the trial of an indictment for murder and who in cross-examination had made statements tending to support a contention of the defense that he was testifying under the influence of a police officer, was allowed in re-direct examination to relate conversations he had had with the members of his household tending to show that he was not testifying under such influence; and the members of his household were allowed to testify to the same conversations. *Commonwealth* v. *Marshall*, 86.

Of Intention.

In an action under R. L. c. 185, § 7, for three times the damages alleged to have been caused by the defendant wilfully cutting down trees on the plaintiff's land without license and with no good reason to believe that the land was his own or that his acts were authorized, evidence offered by the defendant, to show that when he cut the trees he believed he had a right to do so, was excluded properly. *Palmer* v. *Davidson*, 556.

Of Value.

Upon the question of the fair market value of personal property, the presiding judge at a trial properly may instruct the jury to disregard testimony as to a sale of the property at auction if the testimony is indefinite and uncertain and contains no statement of a definite price. *Maguire* v. *Pan-American Amusement Co.* 22.

Of Unlawful Enticement.

Evidence tending to show adultery of the defendant with the plaintiff's husband was held to have been admissible at the trial of an action by one woman against another for wrongfully enticing away the husband of the plaintiff, although adultery was not charged in the declaration. *Webber* v. *Benbow*, 366.

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Of Damage.

At the trial of an action of tort for personal injuries by a woman who had been studying music with the intention of becoming a singer for hire and had received injuries which resulted in an impairment of her voice, the plaintiff may introduce evidence of her studies and intentions and of the injury to her voice as bearing on the question of impairment of her earning capacity. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

And in such an action the plaintiff may be allowed to show as special damages that by reason of her injury she was unable to keep an appointment to sing for which she was to have received pay. *Ibid.*

Photograph.

Proper exercise of discretion by the judge presiding at the trial of an action by a passenger against a railroad corporation for personal injuries received in a collision between a car in which the plaintiff was a passenger and an engine of the defendant which ran into the car from the rear, in admitting as evidence a photograph of the car in question taken almost immediately after the collision. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

EXECUTOR AND ADMINISTRATOR.

A demurrer to a bill in equity setting forth a claim against an executor or administrator will not be sustained on the ground that the suit is barred by the special statute of limitations, R. L. c. 141, § 9, where it is not alleged in the bill that any notice of the defendant's appointment as required by R. L. c. 139, § 1, had been given by the executor. *Bowker* v. *Torrey*, 282.

A transfer of personal property held by an executor to himself as trustee does not become a distribution making the property no longer assessable to the executor, within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, until the executor's account showing the transfer has been allowed by the Probate Court. *Welch* v. *Boston*, 178.

An action purporting to be brought for injuries sustained by a person named as plaintiff, who had died before the date of the writ and for whose estate no executor or administrator had been appointed, has no legal existence, and an administrator subsequently appointed cannot be made the plaintiff by an amendment under R. L. c. 173, § 48. *Brooks* v. *Boston & Northern Street Railway*, 277.

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator. *Allen* v. *Puritan Trust Co.* 409.

Suit in equity by an administrator *de bonis non* against a bank, seeking to hold the defendant liable for sums of money drawn from the account with the defendant of the estate of the plaintiff's intestate by a former administrator by checks payable to his own order which he deposited in his individual account with the defendant and used for his own purposes. *Ibid.*

On an appeal by trustees of a trust established by deed from a decree of the

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Probate Court granting a petition under R. L. c. 147, § 20, by an administrator of the estate of one unaccountably absent for more than seven years for the liquidation and distribution of the trust fund, it appeared that the time had arrived for the distribution of the fund but that the petitioner was entitled to no part of it; and the decree of the Probate Court therefore was reversed and it was ordered that the petition be dismissed unless the Probate Court allowed the parties entitled to share in the distribution to intervene. *Whitwell* v. *Bartlett*, 238.

FEEBLE-MINDED PERSON.

The conservator of a feeble-minded person is not a proper party defendant in a suit in equity against a trustee of a fund placed in trust for the benefit of such person; but the feeble-minded person should be made a party defendant and the conservator on his own application then may be appointed guardian *ad litem*. *King* v. *Stowell*, 246.

FIRE.

Under St. 1906, c. 463, Part II, § 247, where a building has been destroyed by fire communicated by a locomotive engine of a railroad corporation, such corporation is liable to the owner of the building for the fair value of the building at the time of the fire, and not merely for its market value when that would not indemnify the owner for his loss. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

Action to enforce such liability where buildings and shade trees of the plaintiff were destroyed. *Ibid.*

FISH AND GAME COMMISSIONERS.

Construction and constitutionality of R. L. c. 91, § 8, as amended by St. 1906, c. 356, § 1, giving to the commissioners on fisheries and game power under certain circumstances to prohibit or regulate the discharge of sawdust from any particular sawmill, and certain action of the commissioners which was held not to have been unreasonable. *Lyman* v. *Commissioners on Fisheries & Game*, 10.

FOOD.

Action of tort against a manufacturer for injuries to the plaintiff's wife and child caused by their using a preparation of malt purchased in a sealed bottle from a druggist to whom it had come through a wholesale dealer from the defendant, who had represented as of his own knowledge by public advertisements that it was a healthful mixture, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment. *Roberts* v. *Anheuser Busch Brewing Association*, 449.

FRATERNAL BENEFICIARY CORPORATION.

A section of the constitution of a certain fraternal beneficiary corporation requiring that the members should provide themselves with uniforms was held not to be outside the general purposes for which the society was in-

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corporated or to be unreasonable, and a cancellation of membership inflicted as a penalty for non-compliance with such provision was held not as a matter of law to be too severe. *Solari* v. *Italian Society of Columbus*, 382.

On a construction of such a constitution, it was said that it seemed that so long as a member did not have the society uniform his right to benefits was suspended without any action by the directors. *Ibid.*

Where the member's right to benefits had been declared lost by a vote of the directors before the injury by reason of which a benefit was claimed, such action was held not to have been waived by another similar vote passed after the injury. *Ibid.*

FRATERNAL BENEFICIARY ORDER.

See VOLUNTARY ASSOCIATION.

FRAUD.

A suit for specific performance of an alleged contract cannot be maintained where it appears that the alleged contract was executed and intended to be made with the defendant by the plaintiff's assignor, a corporation, when the defendant was led through fraud to believe that he was making an agreement with another corporation of the same name organized under the laws of a different State. *Brighton Packing Co.* v. *Butchers' Slaughtering & Melting Association*, 398.

And acts of the defendant, based upon the same erroneous belief, recognizing the plaintiff as the assignee of the agreement and permitting the plaintiff to incur expense relying upon the validity of the agreement and in expectation of its fulfilment, do not estop the defendant from setting up the defense that he never made the alleged agreement with the plaintiff's assignor. *Ibid.*

Suit in equity against an insurance company to compel the return to the plaintiff of his promissory note and an assignment of his policy, where it appeared that the defendant procured the note and assignment in a loan transaction which never was completed because an agent of the defendant, instead of delivering to the plaintiff a check for the amount of the loan, fraudulently procured the indorsement of the check in blank by the plaintiff and then absconded with its proceeds. *Barry* v. *Mutual Life Ins. Co.* 306.

A trust company holding as trustee under an agreement in writing assignments of mortgages of real estate to secure the debenture bonds of an investment company was held not to be liable to the bondholders for a loss suffered from fraudulent acts of officers of the investment company which were made possible by the failure of the company to record the assignments of the mortgages, it appearing that under the provisions of the trust deed and the other circumstances the company was under no duty to record the assignments. *Partridge* v. *American Trust Co.* 194.

Suit in equity for the determination of the rights of various persons in certain shares of stock in a corporation, where it appeared that the owner had placed his certificate of stock indorsed in blank in the hands of a stockbroker with an instrument of power of transfer, that the stockbroker dishonestly had delivered the certificate to a bank in pledge, that the owner by

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Fraud (*continued*).

reason of a custom was estopped to deny the bank's title and that thereafter the dishonest stockbroker had made various transfers to other persons of his "right, title and interest" in the shares subject to the rights of the bank. *Baker* v. *Davie*, 429.

FRAUDS, STATUTE OF.

Where a brother, who when insolvent received certain mortgages of real estate by inheritance from a sister, who had refrained from making a will because he orally had promised her that he would distribute her property in accordance with her wishes, executes the oral trust by transferring the property, a trustee in bankruptcy of his estate afterward appointed cannot follow such property, the statute of frauds not preventing the proof of the oral trust which had been fully executed. *Bailey* v. *Wood*, 37.

Evidence which was held to warrant a finding that, after a subcontractor had refused to do further work in the construction of a building because of arrears in payments by the general contractor, the owner for a good consideration had made a promise, which was not within the statute of frauds, to assume the obligation of the general contractor with the subcontractor, and the subcontractor had agreed to the substitution. *McNulty* v. *Cruff*, 489.

GOVERNOR AND COUNCIL.

Whether under c. 3, art. 2 of the Constitution the Governor alone can require the opinions of the Justices in regard to a bill laid before him for his revisal under c. 1, § 1, art. 2 of the Constitution, was referred to as a question left open for future consideration. *Opinion of the Justices*, 620.

Without considering whether under c. 3, art. 2 of the Constitution the Council without the concurrence of the Governor may require the opinions of the Justices, the Justices declined to answer a question addressed to them by the Council where it did not appear to what, if any, pending matter the question related. *Answer of the Justices*, 630.

Under St. 1909, c. 504, § 18, by which the trustees of a State institution covered by the provisions of that chapter are authorized to determine the salaries of all the officers of the institution, "subject to the approval of the Governor and Council," such approval must be given by the Governor and also by the Council, each acting independently of the other and not sitting together as a single executive board. *Opinion of the Justices*, 632.

GRADE CROSSING.

Various rulings, which were held not to have been erroneous, at the trial of a petition for the assessment of damages alleged to have been suffered by a corporation engaged in receiving, storing and selling coal on a wharf by reason of the abolition of a grade crossing of a railroad and a highway. *Philadelphia & Reading Coal & Iron Co.* v. *Boston*, 526.

GUARDIAN.

A trustee under a will and a guardian *ad litem* appointed to represent the absentee and others in proceedings under St. 1905, c. 326, for the appointment of trustees and the distribution of property held by the trustee under the will for a beneficiary who has been unheard of for more than

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fourteen years, have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution. *Adams* v. *Adams*, 198.

The conservator of a feeble-minded person is not a proper party defendant in a suit in equity against a trustee of a fund placed in trust for the benefit of such person; but the feeble-minded person should be made a party defendant and the conservator on his own application then may be appointed guardian *ad litem*. *King* v. *Stowell*, 246.

HIGHWAY.

See WAY, *Public*.

HOMESTEAD.

The Legislature have no power to authorize the use of money of the Commonwealth, or of money deposited in the treasury of the Commonwealth by savings banks under St. 1908, c. 590, § 56, to purchase land, and develop, build upon, rent, manage, sell and repurchase it, for the purpose of "providing homes for mechanics, laborers or other wage earners," or "for the purpose of improving the public health by providing homes in the more thinly populated areas of the State." *Opinion of the Justices*, 624.

HOMICIDE.

Discretion of a judge presiding at the trial of an indictment for murder, in permitting a daughter of the defendant nine years and ten months of age to testify for the Commonwealth, was held not to have been exercised improperly. *Commonwealth* v. *Marshall*, 86.

A witness, who had testified for the Commonwealth at the trial of an indictment for murder and who in cross-examination had made statements tending to support a contention of the defense that he was testifying under the influence of a police officer, was allowed in redirect examination to relate conversations he had had with the members of his household tending to show that he was not testifying under such influence; and the members of his household were allowed to testify to the same conversations. *Ibid.*

HUSBAND AND WIFE.

Money of a wife which was paid into court under R. L. c. 173, § 37, was held not to be able to be reached and applied by a creditor of the husband in a suit in equity under R. L. c. 159, § 3, cl. 7. *Berlin Mills Co.* v. *Lowe*, 28.

Designation, as the beneficiary in a policy of life insurance issued by a company organized in another State, of a person described as the wife of the insured was held to be valid where it appeared that at the time the policy was issued the insured and such beneficiary were living together in this Commonwealth as husband and wife in reliance upon a marriage ceremony performed in another State which was valid there and in every State except Massachusetts. *Brogi* v. *Brogi*, 512.

Exceptions to the dismissal of a petition filed in the Supreme Judicial Court and entitled "a petition to vacate a judgment decree of the Probate Court for suitable maintenance" were overruled and, on an appeal from a decree dismissing the petition, the decree was affirmed. *Cogan* v. *Cogan*, 290.

A declaration, in an action by one woman against another, which alleges that

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Husband and Wife (*continued*).

the defendant unlawfully gained the affections of the plaintiff's husband and enticed him to leave her home and to continue absent from it, "whereby the plaintiff lost the comfort, society, aid, assistance and support of her said husband and his affection for the plaintiff was wholly alienated and destroyed," states a cause of action for loss of consortium. *Webber* v. *Benbow*, 366.

Evidence tending to show adultery of the defendant with the plaintiff's husband was held to be admissible at the trial of such case. *Ibid.*

ICE AND SNOW.

See SNOW AND ICE.

INFANT.

A father who has acted as next friend for his minor son in an action by the son for personal injuries, after a judgment for the plaintiff has been entered and execution has issued and has been satisfied, has no authority to settle a controversy with the attorney at law who conducted the action as to the amount to be retained by the attorney for his services out of the money collected by him upon the execution, or to give in behalf of the minor a release of the attorney from all claims. *Blake* v. *Corcoran*, 406.

In an action for personal injuries caused by negligent operation of an automobile by the minor son of the defendant, a finding that the son was the servant of his father in the operation of the automobile was held to have been warranted by the evidence. *Smith* v. *Jordan*, 269.

INSURANCE.

Life.

In this Commonwealth it is settled law that, in the absence of any indication that the transaction was intended as a wagering contract, the beneficiary designated in a policy of life insurance need not have an insurable interest. *Brogi* v. *Brogi*, 512.

Designation as the beneficiary in a policy of life insurance issued by a company organized in another State of a person described as the wife of the insured was held to be valid where it appeared that at the time the policy was issued the insured and such beneficiary were living together in this Commonwealth as husband and wife in reliance upon a marriage ceremony performed in another State which was valid there and in every State except Massachusetts. *Ibid.*

INTEREST.

A plaintiff in an action against a city under R. L. c. 51, § 18, for personal injuries caused by a defect in a highway is not entitled to have the jury instructed that in ascertaining damages they may add to what they consider fair compensation to the plaintiff for the injuries he has suffered a further sum as interest due to him by reason of the delay caused by his having to resort to an action to enforce his claim. *Cochran* v. *Boston*, 171.

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INTERSTATE COMMERCE.

Constitutionality of various statutes as affected by their relation to interstate commerce, see *Rosenbush* v. *Bernheimer*, 146; *Opinions of the Justices*, 605, 620.

JOINT TORTFEASORS.

In an action of tort against three joint tortfeasors, covenants not to sue given by the plaintiff to two of the defendants do not release the third defendant from liability. *Matheson* v. *O'Kane*, 91.

And where it appeared that such covenants had been given upon receipt of money, the question whether the money was accepted by the plaintiff in full satisfaction was held to have been one of fact for the jury. *Ibid.*

And a discontinuance of the action as against two of the defendants does not affect the liability of the third. *Ibid.*

JUDGMENT.

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator. *Allen* v. *Puritan Trust Co.* 409.

The question, whether a judgment dismissing a libel for divorce is a bar to the admission in evidence, at the trial of a libel subsequently filed by the same libellant against the same libellee, of certain matters testified to at the hearing of the former libel, was referred to but was not decided in *Newman* v. *Newman*, 508.

JURY AND JURORS.

Where, after a jury have returned answers to questions submitted to them in writing by the presiding judge, the judge orally asks them a further question with regard to a material issue, he should not accept and act upon an answer given orally by only two of the jurymen, neither of whom is the foreman, although there is no contradiction by the other jurymen. *Burke* v. *Hodge*, 156.

Order made by this court in an action where exceptions by the plaintiff were sustained to the acceptance by the trial judge of oral answers of two jurors only, neither of whom was the foreman, in reply to questions asked by him of the jury orally as to the meaning of the jury's answers to seventeen special questions which had been submitted to them. *Ibid.*

LABOR.

A statute undertaking to exempt trade unions and associations of employers and their members and officials from liability for tortious acts committed by or on behalf of such a union or association would be unconstitutional. *Opinion of the Justices*, 618.

A statute requiring that all goods made by convict labor in a penal institution in this or any other State before being sold in this Commonwealth shall be

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marked in such a way as to indicate conspicuously the source of their manufacture, which by its terms plainly applies to interstate commerce, would be in violation of the Constitution of the United States. *Opinion of the Justices*, 605.

LABOR UNION.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff by means of an unlawful strike which compelled the plaintiff's superior to leave the question whether he should discharge the plaintiff to a vote of the workmen, a majority of whom voted for his discharge, the plaintiff is entitled to relief against the defendants who instigated and maintained the strike and not merely against those workmen who voted at the quarry for his discharge. *Hanson* v. *Innis*, 301.

In such suit the plaintiff was held to be entitled to recover damages not only for the loss of wages due to his discharge but also, once for all, for his present and prospective inability to procure employment caused by the unlawful acts of the defendants. *Ibid.*

Unconstitutionality of a statute undertaking to exempt trade unions and their members and officials from liability for tortious acts, see *Opinion of the Justices*, 618.

LACHES.

See EQUITY JURISDICTION, *Laches.*

LAND COURT.

Jurisdiction.

Under R. L. c. 128, § 18, as amended by St. 1905, c. 249, § 2, the Land Court may register the title to an estate in fee in land under a railroad location, although the rights of the railroad corporation, assuming them to have been acquired by eminent domain, are substantially permanent and practically exclusive so long as the land is used for the purposes of a railroad. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

LANDLORD AND TENANT.

Surrender.

Under a lease of a room in a building for five years providing that the lessee may have the right to surrender the premises at the end of three years by giving to the lessor on or before a certain date a notice in writing of his intention to do so, no surrender of the premises is effected unless, besides giving the notice as required, the lessee ceases to occupy the premises at the end of the three years. *Pope* v. *Abbott*, 582.

At the trial of a petition by a corporation which was in possession of land under a lease in writing for the assessment of damages alleged to have been suffered by reason of the abolition of a grade crossing of a railroad with a highway, an issue was, whether the petitioner had surrendered to the lessor a portion of the premises leased, and it was held that, upon conflicting evidence, that question properly was left to the jury. *Philadelphia & Reading Coal & Iron Co.* v. *Boston*, 526.

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Recording of Lease for more than Seven Years.

The fact, that a lease in writing for a term of twenty years, under which the petitioner in a petition against a city for the assessment of damages alleged to have been suffered by the abolition of a grade crossing of a railroad with a highway claimed title, was not recorded before the petition was filed, was held not to render the lease invalid as against the respondent or to prevent its being used for the purpose of increasing damages, where the lease was recorded before the completion of the trial. *Philadelphia & Reading Coal & Iron Co.* v. *Boston*, 526.

LEGACY.

See DEVISE AND LEGACY.

LEWIS WHARF COMPANY.

The Lewis Wharf Company, created by St. 1834, c. 115, was held to have power to maintain a tenement house within territory designated in that statute. *Grella* v. *Lewis Wharf Co.* 54.

LIEN.

R. L. c. 165, § 48, which gives an attorney at law a lien for the amount of his fees and disbursements upon money collected by him on an execution in favor of a client, gives such attorney no lien for counsel fees for services. *Blake* v. *Corcoran*, 406.

MECHANIC'S LIEN, see that title.

LIMITATIONS, STATUTE OF.

In a suit in equity by the bank commissioner in the name of a savings bank against the members of the investment committee of the bank for losses incurred from loans made in violation of St. 1894, c. 317, §§ 21, 24, the defendants stand in the relation of trustees toward the bank and its depositors, and consequently the statute of limitations begins to run against the bank only from the time that it learned of the defendants' wrongdoing. *Greenfield Savings Bank* v. *Abercrombie*, 252.

See also that sub-title under EQUITY JURISDICTION.

LOAN.

Suit in equity against an insurance company to compel the return to the plaintiff of his promissory note and an assignment of his policy, where it appeared that the defendant procured the note and assignment in a loan transaction which never was completed because an agent of the defendant, instead of delivering to the plaintiff a check for the amount of the loan, fraudulently procured the indorsement of the check in blank by the plaintiff and then absconded with its proceeds. *Barry* v. *Mutual Life Ins. Co.* 306.

Rights in equity of various persons in shares of stock pledged by dishonest broker, see *Baker* v. *Davie*, 429.

Small loans, see SMALL LOANS ACT.

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LORD'S DAY.

In an action of replevin for the possession of certain fish, the question, whether a sale of the fish on a Lord's day to the plaintiff by one of two partners who owned them was valid, was held not to be material where it appeared that the plaintiff relied to prove his title solely on a bill of sale afterwards given to him on a secular day by the other partner acting for the partnership. *Payne* v. *Dexter*, 1.

MARRIAGE AND DIVORCE.

Review by RUGG, C. J., of the successive statutes of this Commonwealth authorizing a decree for alimony after the entry of a decree of divorce. *Parker* v. *Parker*, 139.

Where a decree for an absolute divorce was made in favor of a wife against a non-resident husband, who received notice of the proceedings only by mail and did not appear and whose property was not attached, the Superior Court under R. L. c. 152, § 30, has jurisdiction to grant a petition of the libellant for alimony which was filed after the libellee had become a resident of this Commonwealth and was served upon him personally. *Ibid.*

The question, whether a judgment dismissing a libel for divorce is a bar to the admission in evidence, at the trial of a libel subsequently filed by the same libellant against the same libellee, of certain matters testified to at the hearing of the former libel, was referred to but was not decided because a finding of the trial judge was held to have made any error committed in the admission of the evidence immaterial. *Newman* v. *Newman*, 508.

Where a libel for divorce contains the allegation that the libellant always has been faithful to his marriage vows and obligations and the answer is a general denial without any specification under Divorce Rule 9 of any substantive fact which the libellee intends to rely upon at the hearing, the libellee cannot be allowed to show that the libellant has been unfaithful to his marriage vows by misconduct which has no relation to the offense charged in the libel. *Ibid.*

MARRIED WOMEN.

See HUSBAND AND WIFE.

MARSHALLING OF ASSETS.

See EQUITY JURISDICTION, *Marshalling.*

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability.*

MECHANIC'S LIEN.

Statement of Lien.

A refusal of a judge presiding at the trial of a petition to enforce a mechanic's lien, to rule that a defective statement filed by the petitioner was insufficient as a matter of law to support the petition, was held not to have been shown to have been erroneous where it did not appear from the record that the statement was intended to mislead or that the respondent was misled thereby. *Thompson* v. *Luciano*, 169.

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Application of Payment on Account.

In a petition by a mason to enforce a mechanic's lien, where it appeared that the petitioner had been engaged in building chimneys for the respondent under an entire contract for labor and materials and had received from the owner $500 and had given him a receipt "on account of . . . contract for mason work," it was held that the language of the receipt was not as a matter of law conclusive evidence that the $500 was to be applied to the labor account. *Thompson* v. *Luciano*, 169.

MERGER.

Where one, who holds the equity of redemption in certain real estate subject to a mortgage, inherits such mortgage as the sole heir and next of kin of its owner, but takes it with other property subject to an oral trust which he executes in full, the existence of the trust prevents the extinguishment of the mortgage by merger. *Bailey* v. *Wood*, 37.

MINOR.

See INFANT.

MISTAKE.

The rule, that money voluntarily paid by a person in his own behalf under no mistake as to the facts cannot be recovered back, does not apply to an action brought by a county to recover the amount of an unauthorized payment made in good faith by the county treasurer. *County of Norfolk* v. *Cook*, 390.

Correction of mistake by suit in equity, see *Holbrook* v. *Schofield*, 234; *Bowker* v. *Torrey*, 282.

MONOPOLY.

A statute, forbidding any person engaged in the production or distribution of a commodity in general use to discriminate in the price of such commodity between different parts of the Commonwealth or between different purchasers either maliciously or for the purpose of destroying the business of a competitor and of creating a monopoly, and also prohibiting combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly, is within the police power of the Legislature, and, as it affects interstate commerce only indirectly, is not in violation of art. 1, § 8 of the Constitution of the United States. *Opinion of the Justices*, 620.

MORTGAGE.

Of Personal Property.

Review by DECOURCY, J., of the successive statutes of this Commonwealth relating to the recording of notice of an intention to foreclose a mortgage of personal property. *Reade* v. *Woburn National Bank*, 320.

In a foreclosure of a mortgage of personal property by notice without a sale under a power, R. L. c. 198, § 6, requires not only the recording of the notice of the intention to foreclose but also the recording with it of an affidavit of the service of the notice, and the "sixty days after such notice is so recorded,"

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within which the mortgaged property may be redeemed under § 7 of the same chapter, does not begin to run from the recording of such a notice with the officer's return of service thereon without an affidavit. *Reade* v. *Woburn National Bank*, 320.

Of Real Estate.

Assignment.

One to whom a second assignment of a mortgage of real estate was made after the mortgage note had become due was held to have, in a surplus left after a foreclosure of the mortgage by the first assignee, rights which were paramount to those of the mortgagor, although it appeared that the mortgagor had given the mortgage to a builder who had made with him a contract to construct a building on the land and to use the mortgage to raise funds for that purpose, and that the builder had failed to perform the contract. *Gilfeather* v. *Cohen*, 119.

Merger.

Where one, who holds the equity of redemption in certain real estate subject to a mortgage, inherits such mortgage as the sole heir and next of kin of its owner, but takes it with other property subject to an oral trust which he executes in full, the existence of the trust prevents the extinguishment of the mortgage by merger. *Bailey* v. *Wood*, 37.

Foreclosure.

Unintentional error in the published notice of a foreclosure sale of real estate under a power in a mortgage which, it was held, did not invalidate the sale. *Turansky* v. *Weinberg*, 324.

Where in a foreclosure sale of real estate under a power in a mortgage all the terms of the power and all the statutory requirements were complied with in good faith, the fact that the price obtained was inadequate does not require that a suit in equity to set aside the sale should be sustained. *Ibid.*

Action for deficiency after foreclosure.

Proper ordering of a verdict for the plaintiff in an action against the maker of a promissory note which, with a second note signed by another person, was secured by a single mortgage which had been foreclosed by a sale and the proceeds of the sale applied in full payment of the second note and in part payment of the note in suit. *Boston Safe Deposit & Trust Co.* v. *Manning*, 584.

MUNICIPAL CORPORATIONS.

By-Laws and Ordinances.

Construction of R. L. c. 104, § 1, providing that any city, except Boston, which has accepted the provisions of that section, for the prevention of fire might make certain regulations regarding the construction and alteration and use of buildings and prescribe penalties for violations of such regulations. *Commonwealth* v. *Hayden*, 296.

Officers and Agents.

Mayor and acting mayor.

The time given to the executive officer of a city for deliberating whether he shall approve or disapprove an act of a legislative body of the city does not

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begin to run until the legislative act has come to him in fact, and no constructive or implied action falling short of a physical putting of the act before him suffices. *Dimick* v. *Barry*, 165.

What is a matter "not admitting of delay" as to which under R. L. c. 26, §§ 29, 30, except as otherwise provided by city charters, the presiding officer of the board of aldermen of a city has power to act, in case of the death, resignation or absence of the mayor or of his inability to perform the duties of his office, must be determined according to the usual course of judicial procedure as each case arises. *Ibid.*

An order laying out a street was held not to be such a matter "not admitting of delay." *Ibid.*

Tree warden.

A tree warden is a public officer, whose duties are established by statute, and in the performance of those duties he does not act as the servant or agent of the town or city in which he is appointed. *Donohue* v. *Newburyport*, 561.

"Such officers or agents."

Who are "such officers or agents" of a city, county or town, with whom a contractor or subcontractor for public works, in order to comply with St. 1909, c. 514, § 23, must file the sworn statement therein required, see *Tower* v. *Miller*, 113.

Negligence causing Death.

R. L. c. 171, § 2, as amended by St. 1907, c. 375, relating to the liability of "a person or corporation" for causing death "by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business," does not apply to a town or city in connection with its ordinary municipal functions. *Donohue* v. *Newburyport*, 561.

Liability for Defects in Highways.

Liability of municipal corporations for injuries resulting from defects in highways, see WAY, *Public*, Defect.

Statutory Liability to Contractor or Subcontractor of Public Work.

Under St. 1909, c. 514, § 23, a contractor or subcontractor who has furnished material for the construction of a school house under a contract made in behalf of a city by its mayor and its committee on city property, in order to obtain the advantage of the security provided for by the statute, must file a sworn statement of his claim within the required time "with such officers or agents" and a filing of his claim with the city treasurer is not a compliance with the statute. *Tower* v. *Miller*, 113.

MURDER.

See HOMICIDE.

NAPHTHA.

Action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have resulted from an explosion of naphtha sold under an assumed name and sold negligently. *Gately* v. *Taylor*, 60.

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NEGLIGENCE.

Due Care of Plaintiff.

Of the driver of a milk wagon struck by an automobile, see *Elkins* v. *Felch*, 534.

Of a woman dragging a large packing box in a crowded street. *DiIorio* v. *Jordan Marsh Co.* 280.

Of a woman who, having seen a mass of snow and ice fall on a sidewalk in front of her, but not having been warned otherwise, proceeds along the sidewalk and is struck by snow thrown from the roof of a building, see *Mallen* v. *James A. Houston Co.* 298.

Of an employee in a candy factory who was injured because she pressed down on a loose carrier belt of a caramel cutting machine. *Glass* v. *Hazen Confectionery Co.* 99.

Of an employee getting upon a defective elevator by direction of his employer's superintendent in justifiable reliance upon the superintendent's assurances that it was safe to do so. *Holder* v. *Massachusetts Horticultural Society*, 370.

Of a workman between tracks of a street railway where he was struck by a passing car, see *Heaney* v. *Boston Elevated Railway*, 467.

Of a car cleaner in the employ of a railroad corporation in passing along a dangerous route in a railroad yard, see *Flaherty* v. *New York Central & Hudson River Railroad*, 570.

Of children crossing street car tracks, see *Purcell* v. *Boston Elevated Railway*, 79; *Breen* v. *Boston Elevated Railway*, 519.

Of a boy who while walking in a street to avoid obstructions upon the sidewalk was struck by a street car going in the same direction, see *Hennessey* v. *Boston Elevated Railway*, 524.

Of old men crossing streets in front of approaching street cars, see *Lunderkin* v. *Boston Elevated Railway*, 144; *Stone* v. *Boston Elevated Railway*, 365.

Of a man who looked before crossing street railway tracks and, seeing a car three hundred feet distant, formed an opinion that it was safe to cross, see *O'Toole* v. *Boston Elevated Railway*, 517.

Of a motor cyclist riding from an intersecting street upon street car tracks, see *Robinson* v. *Springfield Street Railway*, 483.

A woman passenger in a vestibule street car, who, having followed a direction of the conductor to leave the car by the forward door, is attempting to alight from the front platform, is not negligent as matter of law in failing to hold up the skirt of her dress which hangs two inches from the ground. *Martin* v. *Old Colony Street Railway*, 535.

Due Care of Plaintiff's Decedent.

Of a fireman upon a locomotive engine, who was struck by a car as he was leaning from the window of the engine cab, see *Mackenzie* v. *New York Central & Hudson River Railroad*, 586.

Of a child seven years of age crossing street railway tracks in a public street on a bright clear day, see *Breen* v. *Boston Elevated Railway*, 519.

Of a boy on a highway watching the removal of a tree from the opposite sidewalk, see *Donohue* v. *Newburyport*, 561.

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Of a newsboy run into by an automobile while he was selling papers near a public square, see *Rasmussen* v. *Whipple*, 546.

Of Child.

Action against a street railway company under R. L. c. 111, § 267, for the death of a girl seven years of age who was run into by a car of the defendant as she was crossing a public street, in which it was held that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury. *Breen* v. *Boston Elevated Railway*, 519.

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train of the defendant while he was a trespasser upon the defendant's track, his due care is not an issue. *Santora* v. *New York, New Haven, & Hartford Railroad*, 464.

Action against a street railway company by a girl six and one half years of age to recover for injuries caused by her being run into by a street car of the defendant as she was passing behind another car in crossing a street at its intersection with another street, in which it was held that the question, whether the plaintiff exercised the degree of care which an ordinarily prudent and careful girl of her age reasonably might be expected to use under like circumstances, was for the jury. *Purcell* v. *Boston Elevated Railway*, 79.

Imputed.

Evidence in an action against the owner of a tenement building for causing the death of a child fourteen months old, who fell through an opening in the balustrade of a hallway on the second floor of the building, was held to have warranted the submission to the jury of the question, whether the child's custodian, who might have been found to have been either the mother or a girl to whose care the mother had entrusted the child, was exercising due care at the time of the accident. *Grella* v. *Lewis Wharf Co.* 54.

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train of the defendant while he was a trespasser upon the defendant's track, due care on the part of the child's parents is not an issue. *Santora* v. *New York, New Haven, & Hartford Railroad*, 464.

Trespasser.

A railroad corporation owes to a boy ten years and five months old, who is stealing a ride on the rear of one of its cars, only the duty to refrain from wantonly or wilfully and recklessly exposing him to danger, and it is not evidence of the violation of such duty that the conductor in a gruff voice told the boy to get off the car and shook his fist close to the boy's face, and that the boy was frightened by the conductor's tone of voice and tried to get off but could not and lost his balance and fell. *Shelly* v. *Boston Elevated Railway*, 516.

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train

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Negligence (*continued*).

of the defendant while he was a trespasser upon the defendant's track, neither his age, his due care, due care on the part of his parents, or negligence or gross negligence on the part of employees of the defendant is an issue, and the plaintiff can recover only upon showing that his injuries resulted from wilful or wanton misconduct on the part of the defendant or of its employees. *Santora* v. *New York, New Haven, & Hartford Railroad*, 464.

In such an action there was held to have been no evidence of reckless or wilful misconduct on the part of any of the defendant's employees. *Ibid.*

Licensee.

A railroad company was held to owe no duty greater than to refrain from wanton or wilful misconduct to a member of the general public who used a crossing at grade over its railroad on a private way which was wholly within land of a private owner and was maintained at such owner's expense, the company not having planked the crossing nor made graded approaches to it nor maintained a sign or flagman there, and it not appearing that any of the railroad company's officers or agents knew that the general public ever used the way. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.

Employer's Liability.

Amendment of writ and declaration.

In an action by an administrator against the employer of his intestate for negligence causing the death of the intestate after conscious suffering, the writ and declaration may be amended by substituting the intestate's widow as the plaintiff and by alleging a cause of action under R. L. c. 106, § 73, for causing the instantaneous death of the employee. *Upson* v. *Boston & Maine Railroad*, 446.

Assumption of risk by employee.

Of danger from nails projecting from the ends of mahogany boards in a lumber room. *Murdock* v. *Paine Furniture Co.* 97.

No assumption of risk as a matter of law by an employee getting upon a defective elevator by direction of his employer's superintendent in justifiable reliance upon the superintendent's assurances that it was safe to do so. *Holder* v. *Massachusetts Horticultural Society*, 370.

Employee in a candy factory was held not to have assumed a risk of injury due to the looseness of a carrier belt on a caramel cutting machine. *Glass* v. *Hazen Confectionery Co.* 99.

A car cleaner in the employ of a railroad corporation does not by his contract of employment assume the risk of an injury due to the negligence of a rear brakeman of the railroad corporation in failing to give a customary signal of the approach of a train of empty cars in his control on a spur track leading to a car yard and to his further negligence in failing to stop the train. *Flaherty* v. *New York Central & Hudson River Railroad*, 570.

One employed as a fireman on a locomotive engine of a railroad corporation does not assume as a matter of law the risk of injuries caused either by a car on a branch track in a freight yard being left in switching too near to the

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lead track, or by negligence of a conductor of a switching train in signalling, without inspecting the car's position or warning the fireman, for an engine to run by a car so placed. *Mackenzie* v. *New York Central & Hudson River Railroad*, 586.

In an action against a railroad corporation by an employee who was a car cleaner, for personal injuries sustained by his being run into by a backing train while he was returning to a car yard by the only way permitted by a foreman for reaching the yard from the place where the plaintiff had been at work, it appeared that the cause of the plaintiff's being run into was negligence of a rear brakeman both in failing to give the customary signal and in failing to stop the train by the air brakes, and it was held that the questions, whether the plaintiff was in the exercise of due care and whether he appreciated the risk and voluntarily assumed it, were for the jury. *Ibid.*

Ways, works or machinery.

Action against a ship building corporation to recover for the conscious suffering and death of an employee while working near the bottom of the boiler room hatch of an uncompleted vessel caused by the falling upon him of an angle iron, where there was no evidence as to where the angle iron was before it fell, as to whose property it was or as to what caused it to fall, and it was held that a verdict properly was ordered for the defendant. *Trim* v. *Fore River Ship Building Co.* 593.

Negligent superintendence.

In an action against the owner of a building for injuries caused by the fall of an elevator on which the plaintiff had stepped by direction of a superintendent of the defendant in attempting to repair it, it was held that evidence, tending to show that the plaintiff when injured was on the elevator in obedience to a repeated order of the superintendent and relying upon his assurances that such an act was safe and justifiably believing that there were safety devices to prevent the elevator from falling, was for the jury. *Holder* v. *Massachusetts Horticultural Society*, 370.

A carpenter in going from the roof of one building to that of another used a ladder which he placed with its iron spurs implanted in the tar of a sloping gravel roof. While he was working on the roof of the adjoining building, a superintendent of his employer inserted two pieces of board under the spurs of the ladder without giving the carpenter any warning of the change. When the carpenter started to descend the ladder it slid out from the bottom and he was injured. *Held*, that, although the act of inserting the boards was a manual one, the adoption of the plan of resting the spurs of the ladder on unsecured boards upon a sloping gravel roof could be found to have been an act of superintendence under R. L. c. 106, § 71, cl. 2, and to have been negligent. *Snow* v. *Revere Rubber Co.* 82.

Action against a street railway company by an employee for personal injuries due to being struck by a passing car while he was working between tracks of the defendant, where the questions, whether the plaintiff when injured was in the exercise of due care and whether a superintendent of the defendant who failed to warn the plaintiff of an approaching car was negligent, were for the jury. *Heaney* v. *Boston Elevated Railway*, 467.

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Negligence (*continued*).

Of person in charge of signal, switch, locomotive engine or train.

Action under the employers' liability act against a railroad corporation to recover for the death of a fireman upon a locomotive engine, who was killed because, as he was leaning out of the window of the engine cab, his head was struck by a car which was too near the track on which the engine was running, in which it was held that there was evidence of due care on the part of the plaintiff's decedent and of negligence on the part of the conductor of the train. *Mackenzie* v. *New York Central & Hudson River Railroad*, 586.

Dangerous and defective machinery and appliances.

An action by an employee in a candy factory against her employer for injuries caused by her hand being drawn into a caramel cutting machine because of alleged defective looseness of the carrier belt was held to be for the jury. *Glass* v. *Hazen Confectionery Co.* 99.

Contractor, who was putting elevators in a building and had not undertaken to construct the stagings to be used by his workmen, was held not to be liable at common law for injuries to one of his workmen due to improper construction of a temporary staging. *Johnson* v. *Otis Elevator Co.* 504.

Action by a boy against his employer for injuries sustained from the bursting of a bottle while the plaintiff was operating a bottling machine of the defendant, in which it was held that the case was not a proper one for the application of the doctrine, *res ipsa loquitur*, and that there was no evidence that the defendant was negligent in failing to anticipate an improper working of the machine. *Ragolsky* v. *Nurenberg*, 575.

Dangerous place in which to work.

Contractor, who was putting elevators in a building and had not undertaken to construct the stagings to be used by his workmen, was held not to be liable at common law for injuries to one of his workmen due to improper construction of a temporary staging. *Johnson* v. *Otis Elevator Co.* 504.

Employee was not allowed to recover at common law from his employer for an injury due to his leg coming in contact with a nail which projected from the end of a mahogany board protruding into a passageway between piles of lumber, because the alleged injury was due to an obvious risk of the employer's business which the plaintiff had assumed, and because there was no evidence of negligence of the employer. *Murdock* v. *Paine Furniture Co.* 97.

In an action against a railroad corporation by an employee who was a car cleaner for personal injuries sustained by his being run into by a backing train while he was returning to a car yard by the only way permitted by a foreman for reaching the yard from the place where the plaintiff had been at work, it appeared that the cause of the plaintiff being run into was negligence of a rear brakeman both in failing to give the customary signal and in failing to stop the train by the air brakes, and it was held that the questions, whether the plaintiff was in the exercise of due care and whether he appreciated the risk and voluntarily assumed it, were for the jury. *Flaherty* v. *New York Central & Hudson River Railroad*, 570.

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Street Railway.

Workman in highway.

Action against a street railway company by an employee for personal injuries due to being struck by a passing car while he was working between tracks of the defendant, where the questions, whether the plaintiff when injured was in the exercise of due care and whether a superintendent of the defendant who failed to warn the plaintiff of an approaching car was negligent, were for the jury. *Heaney* v. *Boston Elevated Railway*, 467.

Traveller on highway.

Old man who, when crossing a street in front of an approaching street car, was struck by the car, was held under the circumstances not to have been wanting in due care as a matter of law. *Lunderkin* v. *Boston Elevated Railway*, 144.

A man sixty-three years of age, who in crossing a city street in broad daylight at a place where there is nothing to distract his attention sees a street car, which could have been seen for a distance of at least five hundred feet, rapidly approaching, and deliberately attempts to cross in front of it when very near and is struck by the car, is negligent as matter of law. *Stone* v. *Boston Elevated Railway*, 365.

If a man, before starting to cross an unobstructed street fifty feet wide on which are parallel tracks of a street railway, looks in both directions and sees a car three hundred feet distant approaching upon the farther track, and, having formed the opinion that it is safe to cross, proceeds to do so upon a cross walk, walking at a rate of less than three miles an hour without paying further attention to the approaching car, and is struck by the car and injured, he is not negligent as matter of law. *O'Toole* v. *Boston Elevated Railway*, 517.

In an action for personal injuries against a street railway company by a boy who when injured was less than twelve years of age and who, as he was walking in a street to avoid obstructions placed upon the sidewalk, was struck by a street car going in the same direction, the questions of the plaintiff's due care and of the negligence of the motorman were held to be for the jury. *Hennessey* v. *Boston Elevated Railway*, 524.

Action against a street railway company under R. L. c. 111, § 267, for the death of a girl seven years of age who was run into by a car of the defendant as she was crossing a public street, in which it was held that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury. *Breen* v. *Boston Elevated Railway*, 519.

Action against a street railway company by a girl six and one half years of age to recover for injuries caused by her being run into by a street car of the defendant as she was passing behind a stationary car in crossing a street at its intersection with another street, in which it was held that the question, whether the plaintiff exercised the degree of care which an ordinarily prudent and careful girl of her age reasonably might be expected to use under like circumstances, was for the jury. *Purcell* v. *Boston Elevated Railway*, 79.

Action against a street railway company by one who, while a traveller upon a highway in a city on which the defendant maintained tracks and ran its cars, was injured by falling into an insufficiently guarded trench which had been made by a contractor under a permit from the city and which the plain-

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Negligence (*continued*).

tiff alleged that the defendant had assumed the duty of guarding, where it was held that the question of the defendant's liability was for the jury. *Cleveland* v. *Boston Elevated Railway*, 75.

It was held that, at the trial together of two actions of tort, one against the keeper of a livery stable and the other against a street railway company, for personal injuries received by the plaintiff, while being driven in a cab of one defendant, because of a collision between the cab and a street car of the other defendant, the questions, whether negligence of either or of both of the defendants caused the injury, were for the jury. *Murphy* v. *Duggan*, 461.

In an action against a street railway company for personal injuries received when the plaintiff, while riding a motor cycle, was run into by a street car of the defendant after he had ridden from an intersecting street upon the street where the defendant's tracks were, intending to turn to the left thereon, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the accident was due to negligence for which the defendant was liable, were for the jury. *Robinson* v. *Springfield Street Railway*, 483.

At the trial of such an action, it was held that under the circumstances the plaintiff properly was allowed to be asked in re-direct examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Ibid.*

Trespasser on car.

A street railway corporation owes to a boy ten years and five months old, who is stealing a ride on the rear end of one of its cars, only the duty to refrain from wilfully or wantonly and recklessly exposing him to danger, and it is not evidence of the violation of such duty that the conductor in a gruff voice told the boy to get off the car and shook his fist close to the boy's face, and that the boy was frightened by the conductor's tone of voice and tried to get off but could not and lost his balance and fell. *Shelly* v. *Boston Elevated Railway*, 516.

Passenger.

Action by a woman passenger against a street railway company for injuries sustained when the plaintiff was alighting from the front platform of a vestibule car of the defendant by direction of the conductor and the bottom of her dress caught on the sand-plunger, causing her to be thrown down. *Martin* v. *Old Colony Street Railway*, 535.

In such action it was held that the jury could have found that the motorman of the car in the proper performance of his duty to the plaintiff should have taken some precaution for her safety, either by temporarily removing the pin or guarding it with his foot or warning her of its presence. *Ibid.*

At the trial of an action by a woman against a street railway company for personal injuries caused by the plaintiff slipping upon some tobacco spit about the size of a silver half dollar upon the step of a car of the defendant as she was leaving the car, if there is no evidence tending to show how or when the tobacco spit came upon the step and none that the conductor knew or had any reason to know of its presence there, it is proper to order the jury to find for the defendant, although the conductor of the car testifies that he recognized it as his duty under the rules of the company to see that no slippery substance was allowed to fall or remain on the steps of the car. *Hotenbrink* v. *Boston Elevated Railway*, 77.

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In an action against a corporation operating passenger cars in a tunnel, for injuries caused by a sliding door of a car of the defendant closing by mechanism upon the plaintiff while she was in the act of entering the car, if there is no explanation whatever of the cause of the movement of the door, its closing upon the plaintiff is *prima facie* evidence of negligence, although it was possible for some passenger to have started the machinery by which the door was closed. *Craft* v. *Boston Elevated Railway*, 374.

Proof of motorman's negligence.

Evidence of the length of time that a motorman has been in the employ of a street railway company as a motorman and of the amount of instruction he has received was held to be immaterial and inadmissible, at the trial of an action against the company for personal injuries, upon the questions of what the motorman did and whether what he did was negligent. *Lang* v. *Boston Elevated Railway*, 492.

Railroad.

Trespasser on track.

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train of the defendant while he was a trespasser upon the defendant's track, neither his age, his due care, due care on the part of his parents, or negligence or gross negligence on the part of employees of the defendant is an issue, and the plaintiff can recover only upon showing that his injuries resulted from wilful or wanton misconduct on the part of the defendant or of its employees. *Santora* v. *New York, New Haven, & Hartford Railroad*, 464.

Such an action in which there was held to have been no evidence of reckless or wilful misconduct on the part of any of the defendant's employees. *Ibid.*

Licensee on track.

A railroad company was held to owe no duty greater than to refrain from wanton or wilful misconduct to a member of the general public who used a crossing at grade over its railroad on a private way which was wholly within land of a private owner and was maintained at such owner's expense, the company not having planked the crossing nor made graded approaches to it nor maintained a sign or flagman there, and it not appearing that any of the railroad company's officers or agents knew that the general public ever used the way. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.

Passenger at station.

In an action against a railroad company under R. L. c. 111, § 267, for the death of one who, using a mileage book of the defendant, was travelling wholly over the company's lines to a point beyond a junction point, and, while waiting at the junction point for a connecting train, stayed in the train in which he had arrived instead of in the station, and afterwards, while crossing tracks to the station platform to get to the track upon which the connecting train was to arrive, was struck by a backing engine, it was held that the evidence warranted findings that the deceased was a passenger of the defendant when he was killed, and that his death was caused by negligence of the defendant. *Millett* v. *New York, New Haven, & Hartford Railroad*, 486.

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Negligence (*continued*).

Defect in highway at crossing.

A railroad corporation, which under R. L. c. 111, § 129, is bound to keep in repair a portion of a public way crossed by its road at grade, was held under the circumstances not to be liable under the highway act for injuries to a boy caused by his foot catching between one of the rails of the track and the planking at such a crossing when he was running a race with his companions. *Harris* v. *Boston & Maine Railroad*, 573.

In Use of Highway.

Due care of children crossing street car tracks. *Purcell* v. *Boston Elevated Railway*, 79; *Breen* v. *Boston Elevated Railway*, 519.

In an action for personal injuries against a street railway company by a boy who when injured was less than twelve years of age and who, as he was walking in a street to avoid obstructions placed upon the sidewalk, was struck by a street car going in the same direction, the questions of the plaintiff's due care and of the negligence of the motorman were held to be for the jury. *Hennessey* v. *Boston Elevated Railway*, 524.

It was held that at the trial together of two actions of tort, one against the keeper of a livery stable and the other against a street railway company, for personal injuries received by the plaintiff, while being driven in a cab of one defendant, because of a collision between the cab and a street car of the other defendant, the questions, whether negligence of either or of both of the defendants caused the injury, were for the jury. *Murphy* v. *Duggan*, 461.

Action by a woman against the owner of a horse and wagon, for personal injuries caused by the plaintiff being run into by the horse and wagon as she was moving a large box along the side of a street from one store to that next adjoining, in which it was held that there was evidence that the plaintiff was in the exercise of due care. *DiIorio* v. *Jordan Marsh Co.* 280.

Old man who, when crossing a street in front of an approaching street car, was struck by the car, was held under the circumstances not to have been wanting in due care as a matter of law. *Lunderkin* v. *Boston Elevated Railway*, 144.

A man sixty-three years of age, who in crossing a city street in broad daylight at a place where there is nothing to distract his attention sees a street car, which could have been seen for a distance of at least five hundred feet, rapidly approaching, and deliberately attempts to cross in front of it when very near and is struck by the car, is negligent as matter of law. *Stone* v. *Boston Elevated Railway*, 365.

If a man, before starting to cross an unobstructed street fifty feet wide on which are parallel tracks of a street railway, looks in both directions and sees a car three hundred feet distant approaching upon the farther track, and, having formed the opinion that it is safe to cross, proceeds to do so upon a cross walk, walking at the rate of less than three miles an hour without paying further attention to the approaching car, and is struck by the car and injured, he is not negligent as matter of law. *O'Toole* v. *Boston Elevated Railway*, 517.

In an action against a street railway company for personal injuries received when the plaintiff, while riding a motor cycle, was run into by a street car of

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the defendant, after he had ridden from an intersecting street upon the street where the defendant's tracks were, intending to turn to the left thereon, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the accident was due to negligence for which the defendant was liable, were for the jury. *Robinson* v. *Springfield Street Railway*, 483.

At the trial of such an action it was held that under the circumstances the plaintiff properly was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Ibid.*

Action for personal injuries sustained by reason of a collision of an automobile driven by the defendant with a milk wagon in which the plaintiff was driving, in which exceptions of the defendant after a verdict for the plaintiff were adjudged to have been intended for delay. *Elkins* v. *Felch*, 534.

In an action against the owner of an automobile to recover for the death of a bright, intelligent newsboy caused by his being run into by the defendant's automobile while he was selling papers near a public square, the questions, whether the boy was in the exercise of due care when he was killed, and whether his death was caused by negligence of the defendant, were held to have been for the jury. *Rasmussen* v. *Whipple*, 546.

Facts, that a pair of horses, attached to a dray or caravan, while being used in the business of their owner were left wholly unhitched and unattended standing in a city street near the sidewalk, and that for some unknown reason they swerved and injured a person who was walking along the middle of the sidewalk, were held to be evidence of negligence for which the owner of the horses was liable. *Flynn* v. *O'Riordan*, 477.

Woman, who when walking on the sidewalk of a city street saw a mass of snow and ice fall on the sidewalk in front of her, paused and, receiving no further warning, proceeded on her course and was struck and injured by a mass of snow thrown from the roof of a building by a servant of the occupant of the building, was held not to have been negligent as matter of law. *Mallen* v. *James A. Houston Co.* 298.

It was held that a boy who was a traveller on the sidewalk of a highway of a city and was watching the removing of a dead tree on the edge of the opposite sidewalk when the tree for want of proper support unexpectedly fell across the street and caused his death, might be found to have been in the exercise of due care. *Donohue* v. *Newburyport*, 561.

In an action against a street railway company by one who, while a traveller upon a highway in a city on which the defendant maintained tracks and ran its cars, was injured by falling into an insufficiently guarded trench which had been made by a contractor under a permit from the city and which the plaintiff alleged that the defendant had assumed the duty of guarding, it was held that the question of the defendant's liability was for the jury. *Cleveland* v. *Boston Elevated Railway*, 75.

In Use of Automobile.

In an action for personal injuries caused by negligent operation of an automobile by the minor son of the defendant, a finding that the son was the servant of his father in the operation of the automobile was held to have been warranted by the evidence. *Smith* v. *Jordan*, 269.

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Negligence (*continued*).

Action for personal injuries sustained by reason of a collision of an automobile driven by the defendant with a milk wagon in which the plaintiff was driving, in which exceptions of the defendant after a verdict for the plaintiff were adjudged to have been intended for delay. *Elkins* v. *Felch*, 534.

In an action against the owner of an automobile to recover for the death of a bright, intelligent newsboy caused by his being run into by the defendant's automobile while he was selling papers near a public square, the questions, whether the boy was in the exercise of due care when he was killed and whether his death was caused by negligence of the defendant, were held to have been for the jury. *Rasmussen* v. *Whipple*, 546.

In Use of Motor Cycle.

In an action against a street railway company for personal injuries received when the plaintiff, while riding a motor cycle, was run into by a street car of the defendant, after he had ridden from an intersecting street upon the street where the defendant's tracks were, intending to turn to the left thereon, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the accident was due to negligence for which the defendant was liable, were for the jury. *Robinson* v. *Springfield Street Railway*, 483.

At the trial of such an action it was held that under the circumstances the plaintiff properly was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Ibid.*

In Use of Elevator.

In an action against an owner of a building for injuries caused by the fall of an elevator on which the plaintiff had stepped by direction of a superintendent of the defendant in attempting to repair it, it was held that evidence, tending to show that the plaintiff when injured was on the elevator in obedience to a repeated order of the superintendent and relying upon his assurances that such an act was safe and justifiably believing that there were safety devices to prevent the elevator from falling, was for the jury. *Holder* v. *Massachusetts Horticultural Society*, 370.

Of one controlling Real Estate.

On the evidence in an action for injuries sustained from being struck by a board falling from the roof of an unoccupied house owned and controlled by the defendant while the plaintiff was walking near it on the highway, the question of the negligence of the defendant was held to be for the jury. *Green* v. *Nightingale*, 273.

Woman, who when walking on a sidewalk of a city street saw a mass of snow and ice fall on the sidewalk in front of her, paused and, receiving no further warning, proceeded on her course and was struck and injured by a mass of snow thrown from the roof of a building by a servant of the occupant of the building, was held not to have been negligent as matter of law. *Mallen* v. *James A. Houston Co.* 298.

St. 1908, c. 305, does not cause certain sections of the highway act, in so far as they relate to notices of injuries resulting from snow or ice, to apply to

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an action against the occupant of a building for injuries caused by snow negligently thrown from the roof of the building by a servant of the occupant. *Mallen* v. *James A. Houston Co.* 298.

In an action against the owner of a building for injuries caused by the fall of an elevator on which the plaintiff had stepped by direction of a superintendent of the defendant in attempting to repair it, it was held that evidence, tending to show that the plaintiff when injured was on the elevator in obedience to a repeated order of the superintendent and relying upon his assurances that such an act was safe and justifiably believing that there were safety devices to prevent the elevator from falling, was for the jury. *Holder* v. *Massachusetts Horticultural Society*, 370.

Action against the owner of a house for personal injuries caused by a negligent failure of an agent of the defendant to warn the plaintiff of a dangerous platform in the basement as the plaintiff was examining the house with a view to renting it. *Marston* v. *Reynolds*, 590.

Snow and Ice.

St. 1908, c. 305, does not cause certain sections of the highway act, in so far as they relate to notices of injuries resulting from snow or ice, to apply to an action against the occupant of a building for injuries caused by snow negligently thrown from the roof of the building by a servant of the occupant. *Mallen* v. *James A. Houston Co.* 298.

Woman, who when walking on the sidewalk of a city street saw a mass of snow and ice fall on the sidewalk in front of her, paused and, receiving no further warning, proceeded on her course and was struck and injured by a mass of snow thrown from the roof of a building by a servant of the occupant of the building, was held not to have been negligent as matter of law. *Ibid.*

In Railroad Yard.

In an action against a railroad corporation by an employee who was a car cleaner for personal injuries sustained by his being run into by a backing train while he was returning to a car yard by the only way permitted by the foreman for reaching the yard from the place where the plaintiff had been at work, it appeared that the cause of the plaintiff's being run into was negligence of a rear brakeman both in failing to give the customary signal and in failing to stop the train by the air brakes, and it was held that the questions, whether the plaintiff was in the exercise of due care and whether he appreciated the risk and voluntarily assumed it, were for the jury. *Flaherty* v. *New York Central & Hudson River Railroad*, 570.

Action under the employers' liability act against a railroad corporation to recover for the death of a fireman upon a locomotive engine, who was killed because, as he was leaning out of the window of the engine cab, his head was struck by a car which was too near the track the engine was on, in which it was held that there was evidence of due care on the part of the plaintiff's decedent and of negligence on the part of the conductor of the train. *Mackenzie* v. *New York Central & Hudson River Railroad*, 586.

One employed as a fireman on a locomotive engine of a railroad corporation does not assume as a matter of law the risk of injuries caused either by a car on a branch track in a freight yard being left in switching too near to

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Negligence (*continued*).

the lead track, or by negligence of a conductor of a switching engine in signalling, without inspecting the car's position or warning the fireman, for an engine to run by a car so placed. *Mackenzie* v. *New York Central & Hudson River Railroad*, 586.

In Stable Yard.

Action against the proprietor of a stable by a customer, for injuries resulting from a collision with a stableman of the defendant in the stable yard when both the plaintiff and the stableman were on foot, in which it was held that the plaintiff was entitled to go to the jury both on a count alleging negligence and on a count alleging an assault. *Ryan* v. *Keane*, 543.

In a Factory.

An action by an employee in a candy factory against her employer for injuries caused by her hand being drawn into a caramel cutting machine because of alleged defective looseness of the carrier belt was held to be for the jury. *Glass* v. *Hazen Confectionery Co.* 99.

Employee was not allowed to recover at common law from his employer for an injury due to his leg coming in contact with a nail which projected from the end of a mahogany board protruding into a passageway between piles of lumber because the injury was due to an obvious risk of the employer's business which the plaintiff had assumed, and because there was no evidence of negligence of the employer. *Murdock* v. *Paine Furniture Co.* 97.

In a Tenement.

Evidence in an action against the owner of a tenement building for causing the death of a child fourteen months old, who fell through an opening in the balustrade of a hallway on the second floor of the building, was held to have warranted the submission to the jury of the question, whether the child's custodian, who might have been found to have been either the child's mother or a girl to whose care the mother had entrusted the child, was exercising due care at the time of the accident. *Grella* v. *Lewis Wharf Co.* 54.

Sale of Dangerous Substance.

Action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have resulted from an explosion of naphtha sold under an assumed name and sold negligently. *Gately* v. *Taylor*, 60.

To bar Suit in Equity.

Suit in equity to compel restitution of property of plaintiff procured through fraud of an agent of the defendant, which was held not to have been barred by negligence of the plaintiff. *Barry* v. *Mutual Life Ins. Co.* 306.

Reckless or Wilful Misconduct.

In an action against a railroad corporation by a child twenty-seven months of age to recover for personal injuries due to his being run into by a train of the defendant while he was a trespasser upon the defendant's track, neither his age, his due care, due care on the part of his parents, or negligence or

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gross negligence on the part of the employees of the defendant is an issue, and the plaintiff can recover only upon showing that his injuries resulted from wilful or wanton misconduct on the part of the defendant or of its employees. *Santora* v. *New York, New Haven, & Hartford Railroad*, 464.

In such an action there was held to have been no evidence of reckless or wilful misconduct on the part of any of the defendant's employees. *Ibid.*

A railroad corporation owes to a boy ten years and five months old, who is stealing a ride on the rear end of one of its cars, only the duty to refrain from wantonly or wilfully and recklessly exposing him to danger, and it is not evidence of the violation of such duty that the conductor in a gruff voice told the boy to get off the car and shook his fist close to the boy's face, and that the boy was frightened by the conductor's tone of voice and tried to get off but could not and lost his balance and fell. *Shelly* v. *Boston Elevated Railway*, 516.

Causing Death.

Review by DeCourcy, J., of the statutes of this Commonwealth providing a civil remedy for death caused by negligence. *Grella* v. *Lewis Wharf Co.* 54.

In an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing death by negligence, the plaintiff sustains the burden of proof by proving his case by a preponderance of the evidence. *Ibid.*

R. L. c. 171, § 2, as amended by St. 1907, c. 375, relating to the liability of "a person or corporation" for causing death "by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business," does not apply to a town or city in connection with its ordinary municipal functions. *Donohue* v. *Newburyport*, 561.

Action against a street railway company under R. L. c. 111, § 267, for the death of a girl seven years of age who was run into by a car of the defendant as she was crossing a public street, in which it was held that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury. *Breen* v. *Boston Elevated Railway*, 519.

Action against a ship building corporation to recover for the conscious suffering and death of an employee, while working near the bottom of the boiler room hatch of an uncompleted vessel, caused by the falling upon him of an angle iron, where there was no evidence as to where the angle iron was before it fell, as to whose property it was or as to what caused it to fall, and it was held that a verdict properly was ordered for the defendant. *Trim* v. *Fore River Ship Building Co.* 593.

In an action by an administrator against the employer of his intestate for negligence causing the death of the intestate after conscious suffering, the writ and declaration may be amended by substituting the intestate's widow as the plaintiff and by alleging a cause of action under R. L. c. 106, § 73, for causing the instantaneous death of the employee. *Upson* v. *Boston & Maine Railroad*, 446.

In an action against a railroad company under R. L. c. 111, § 267, for the death of one who, using a mileage book of the defendant, was travelling wholly over the company's lines to a point beyond a junction point, and, while waiting at the junction point for a connecting train, stayed in the train in which he had arrived instead of in the station, and afterwards, while crossing tracks to the station platform to get to the track upon which the connecting train was to arrive, was struck by a backing engine, it was held

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Negligence (*continued*).

that the evidence warranted findings that the deceased was a passenger of the defendant when he was killed, and that his death was caused by negligence of the defendant. *Millett* v. *New York, New Haven, & Hartford Railroad*, 486.

Violation of Statute.

Action for personal injuries alleged to have been suffered from an explosion of naphtha sold under an assumed name in violation of R. L. c. 102, § 108, where it was held that evidence for the plaintiff warranted a finding that the substance sold to the plaintiff was essentially naphtha, and that, such violation of the statute being proved, the plaintiff was entitled to go to the jury without showing expressly that the defendant knew of the nature of the substance sold by him or had any information of its dangerous qualities which should have put him upon inquiry. *Gately* v. *Taylor*, 60.

Evidence of other sales of the compound was held to be immaterial. *Ibid.*

Res ipsa loquitur.

In order for the plaintiff in an action for personal injuries to make out a *prima facie* case in proof of negligence of the defendant by the use of the presumption that arises from the occurrence of the accident, it must appear that the instrumentality which inflicted the injury was in the control of the defendant and subject to his use and inspection, and that the accident was one which in the ordinary experience of mankind would not have happened except from negligence of the defendant or of others for whose negligence the defendant was legally responsible. *Trim* v. *Fore River Ship Building Co.* 593.

In an action against a corporation operating passenger cars in a tunnel, for injuries caused by a sliding door of a car of the defendant closing by mechanism upon the plaintiff while she was in the act of entering the car, if there is no explanation whatever of the cause of the movement of the door, its closing upon the plaintiff is *prima facie* evidence of negligence, although it was possible for some passenger to have started the machinery by which the door was closed. *Craft* v. *Boston Elevated Railway*, 374.

Action by a boy against his employer for injuries sustained from the bursting of a bottle while the plaintiff was operating a bottling machine of the defendant, in which it was held that the case was not a proper one for the application of the doctrine *res ipsa loquitur*, and that there was no evidence that the defendant was negligent in failing to anticipate an improper working of the machine. *Ragolsky* v. *Nurenberg*, 575.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NEXT FRIEND.

See INFANT.

NOTICE.

Who are "such officers or agents" of a city, county or town, with whom a contractor or subcontractor for public works, in order to comply with St.

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1909, c. 514, § 23, must file the sworn statement therein required, see *Tower* v. *Miller*, 113.

St. 1908, c. 305, does not cause certain sections of the highway act, in so far as they relate to notices of injuries resulting from snow or ice, to apply to an action against the occupant of a building for injuries caused by snow negligently thrown from the roof of the building by the servant of the occupant. *Mallen* v. *James A. Houston Co.* 298.

NOVATION.

Evidence which was held to warrant a finding that, after a subcontractor had refused to do further work in the construction of a building because of arrears in payments by the general contractor, the owner for a good consideration had made a promise, which was not within the statute of frauds, to assume the obligation of the general contractor with the subcontractor, and the subcontractor had agreed to the substitution. *McNulty* v. *Cruff*, 489.

PARTNERSHIP.

At the trial of an action of replevin for the possession of certain fish, evidence, tending to show that one member of a partnership in the fish business purchased the fish for the partnership and resold them to the plaintiff, was held to warrant a submission of the case to the jury although there was in evidence an auditor's report finding for the defendant and evidence that the other partner, without the knowledge of the first partner, had made an agreement to manage the business of procuring fish for the defendant in the neighborhood where the transactions occurred. *Payne* v. *Dexter*, 1.

The fact, that one of two partners in purchasing certain property for the partnership used funds which without the knowledge of his partner he had embezzled from a third person, was held not to be material on the question of the validity of a sale of the property by the innocent partner for the partnership. *Ibid.*

The mere fact, that, previous to the execution of a bill of sale of certain personal property by one of two partners purporting to act for the partnership, a representative of the vendee, being informed that the other partner denied the existence of the partnership, had caused the property to be attached as such other partner's individual property, was held not to estop the vendee from denying that the property belonged solely to such partner. *Ibid.*

At the trial of an action where the validity of a bill of sale by one of two partners purporting to act for the partnership was an issue, it was held that the mere fact, that before the sale the other partner informed a representative of the vendee that no partnership existed, did not as matter of law make the conveyance of no effect. *Ibid.*

One, who, not having been admitted to practise as an attorney at law in this Commonwealth, but having a partner who is a member of the Massachusetts bar, performs services in violation of the prohibition of R. L. c. 165, § 45, cannot recover for such services, either alone or jointly with the other member of the firm. *Browne* v. *Phelps*, 376.

On demurrer to a bill in equity it was held that the bill could not be maintained to change the character of an arrangement entered into six years before in good faith between a surviving partner and persons representing the in-

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terests of two deceased partners and a corporation formed to take over the partnership business and assets, or to give the plaintiff, representing the interest of one of the deceased partners, a lien upon property into which the defendant, who represented the interest of the other deceased partner, had converted his interest in real estate formerly of the partnership. *Bowker* v. *Torrey*, 282.

But it was held that the bill might be maintained for an accounting to rectify a mistake made by the parties and to compel a readjustment, as between the parties in the suit, of the division of the shares of stock of the corporation at its par value, or in some other way that would accomplish that end. *Ibid.*

PASSENGER.

In an action against a railroad company under R. L. c. 111, § 267, for the death of one who, using a mileage book of the defendant, was travelling wholly over the company's lines to a point beyond a junction point, and, while waiting at the junction point for a connecting train, stayed in the train in which he had arrived instead of in the station, and afterwards, while crossing tracks to the station platform to get to the track upon which the connecting train was to arrive, was struck by a backing engine, it was held that the evidence warranted findings that the deceased was a passenger of the defendant when he was killed, and that his death was caused by negligence of the defendant. *Millett* v. *New York, New Haven, & Hartford Railroad*, 486.

Actions by passengers against street railway corporations, see NEGLIGENCE, *Street Railway*, Passenger.

PAYMENT.

Certain payment, by the owner of a building under construction to the building contractor who was constructing it, was held not to have been a payment under the contract, but a loan, and not to have released the sureties on the contractor's bond to any extent. *Museum of Fine Arts* v. *American Bonding Co.* 124.

In a petition by a mason to enforce a mechanic's lien, where it appeared that the petitioner had been engaged in building chimneys for the respondent under an entire contract for labor and materials and had received from the owner $500 and had given him a receipt "on account of . . . contract for mason work," it was held that the language of the receipt was not as a matter of law conclusive evidence that the $500 was to be applied to the labor account. *Thompson* v. *Luciano*, 169.

PHOTOGRAPH.

Use of a photograph as evidence. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

PLEADING, CIVIL.

Declaration.

Declaration in an action by one woman against another for unlawful enticement of the plaintiff's husband. *Webber* v. *Benbow*, 366.

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An allegation in a declaration that the defendant falsely and fraudulently represented that she desired to purchase the plaintiff's lodging house business for $600, relying on which the plaintiff suffered loss, is too indefinite and too remote to sustain an action for deceit. *Gallagher* v. *Hussion*, 369.

PLEDGE.

Where there is a custom, that a certificate of shares in a corporation accompanied by an instrument of power of transfer signed in blank by the person named in the certificate as owner, in the possession of a person who is known and is of good reputation, "if the signature is guaranteed by a stock exchange house," is treated as "capable of good transfer and delivery by such holder" for sale or pledge, the owner who has entrusted such a certificate and power of transfer to such a holder is estopped to deny the title of a pledgee who took the certificate and power of transfer from the holder under such custom in good faith. *Baker* v. *Davie*, 429.

The operation of such an estoppel was held not to be affected by certain fraudulent misrepresentations made by a stockbroker, who was the holder of the certificate and of the power of transfer, as to his right to use the stock, or by the fact that the guaranty of the signature of the owner of the certificate by the stock exchange house on the power of transfer was procured without the knowledge of the owner after its delivery to the holder. *Ibid.*

The owner of the shares was also held not to be estopped to deny the title of one to whom the fraudulent stockbroker had assigned all his "right, title and interest" in them subject to the rights of a trust company who had possession of the certificates as pledgee. *Ibid.*

In a suit in equity by the owner of certain shares of stock held by the defendant under a pledge from a dishonest stockbroker which the plaintiff is estopped to deny, if it appears that the broker who pledged the plaintiff's shares to the defendant also pledged to the defendant to secure the same indebtedness other shares of stock title to which was in the broker, the shares to which the broker had title should be resorted to first in satisfying the defendant's claim before applying the shares to which the plaintiff has the title subject to the pledge. *Ibid.*

POOR DEBTOR.

The condition of a recognizance entered into by a debtor and a surety upon the debtor's arrest upon an execution, that within thirty days from the date of his arrest the debtor will both deliver himself up for examination by the proper magistrate and give notice to the judgment creditor of the time and place fixed by the magistrate for the hearing, is broken if the debtor within the thirty days so delivers himself up and asks for the assignment of a day for a hearing and the magistrate directs the clerk of the court to issue the notice to the judgment creditor, but the notice is not issued within the thirty days. *Henderson* v. *Parsons*, 69.

POWER.

Where a testator devised land to his three children as joint tenants with a remainder in fee to such of their children as should be living at the time of

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the death of his last surviving child, subject to a power in his children to convey "his, her or their interest in and to said real estate . . . to either one or more of the children of any of them," which conveyance so made should "vest in the grantee thereof a full and perfect title in fee simple, notwithstanding the above devise to [the testator's] children as joint tenants," an exercise of the power by the testator's last surviving child in favor of her child while children of the others of the testator's children were living was held to convey a title in fee simple to the whole of the land. *Foster* v. *Smith*, 497.

PRACTICE, CIVIL.

Commencement of Action.

An action purporting to be brought for injuries sustained by a person named as the plaintiff, who had died before the date of the writ and for whose estate no executor or administrator had been appointed, has no legal existence, and an administrator subsequently appointed cannot be made the plaintiff by an amendment under R. L. c. 173, § 48. *Brooks* v. *Boston & Northern Street Railway*, 277.

Parties.

Whether one, who is a party in only two of four actions which are tried together, has any right of exception in the other two actions, see *Payne* v. *Dexter*, 1.

An action purporting to be brought for injuries sustained by a person named as plaintiff, who had died before the date of the writ and for whose estate no executor or administrator has been appointed, has no legal existence, and an administrator subsequently appointed cannot be made the plaintiff by an amendment under R. L. c. 173, § 48. *Brooks* v. *Boston & Northern Street Railway*, 277.

Assessors are not proper parties respondent to a petition under St. 1909, c. 490, Part I, § 77, appealing to the Superior Court from the refusal of the assessors of a town or city to abate a tax. *Welch* v. *Boston*, 178.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

Trustee Process.

See TRUSTEE PROCESS.

Action by Next Friend.

A father who has acted as next friend for his minor son in an action by the son for personal injuries, after a judgment for the plaintiff has been entered and execution has issued and has been satisfied, has no authority to settle a controversy with the attorney at law who conducted the action as to the amount to be deducted by the attorney for his services out of the money collected by him upon the execution, or to give in behalf of the minor a release of the attorney from all claims. *Blake* v. *Corcoran*, 406.

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Divorce Proceedings.

See MARRIAGE AND DIVORCE.

Disbarment Proceedings.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

Amendment.

Where in an action for personal injuries the declaration contains no allegation as to special damages and at the trial evidence is admitted tending to show such damages, which is objected to by the defendant but not on any ground relating to the pleadings, the judge after a verdict for the plaintiff has a right to allow an amendment to the declaration setting forth a claim for such damages. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 132.

An action purporting to be brought for injuries sustained by a person named as plaintiff, who had died before the date of the writ and for whose estate no executor or administrator has been appointed, has no legal existence, and an administrator subsequently appointed cannot be made the plaintiff by an amendment under R. L. c. 173, § 48. *Brooks* v. *Boston & Northern Street Railway*, 277.

Under R. L. c. 173, §§ 48, 121, the writ and declaration, in an action by an administrator against the employer of the plaintiff's intestate for negligence causing the death of the intestate, may be allowed to be amended by substituting the widow of the employee as the plaintiff and alleging a cause of action under R. L. c. 106, § 73, for negligence causing the instantaneous death of the employee. *Upson* v. *Boston & Maine Railroad*, 446.

It is within the discretionary power of a presiding judge to allow after a verdict an amendment increasing the *ad damnum* of the writ. *Laxton* v. *Hay*, 463.

Discontinuance.

In an action of tort against three alleged joint tortfeasors, the plaintiff's discontinuance of the action as against two of them does not affect the liability of the third. *Matheson* v. *O'Kane*, 91.

Dismissal of Action.

An action nominally standing upon the docket of the Superior Court, which in legal effect never has been brought because at the date of the writ there was no person who could bring it, should be dismissed, and it is wrong to order a verdict for the defendant. *Brooks* v. *Boston & Northern Street Railway*, 277.

Disqualification of Judge.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

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Interlocutory Order.

The only way in which an interlocutory order or decision in an action at law can be brought before this court is by a report of a justice of the Supreme Judicial Court or of the Superior Court under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cotter* v. *Nathan & Hurst Co.* 31.

Actions tried together.

Whether one, who is a party in only two of four actions which are tried together, has any right of exception in the other two actions, see *Payne* v. *Dexter*, 1.

Auditor's report, finding for the plaintiff in the first of four actions of replevin which were tried together, was held not to warrant the ordering of a verdict in that action for the plaintiff where there was evidence at the trial on issues in the other three actions tending to control the auditor's findings. *Ibid.*

Where it appears that three actions, each by a workman against his employer, and three other actions by the same plaintiffs against an independent contractor, are for personal injuries alleged to have been caused by the falling of a wall of a building in the construction of which both of the defendants in the cases were engaged, it is a proper exercise of discretion by a judge of the Superior Court to order that the six actions be tried together. *Burke* v. *Hodge*, 156.

Auditor's Report.

Auditor's report, finding for the plaintiff in the first of four actions of replevin which were tried together, was held not to warrant the ordering of a verdict in that action for the plaintiff where there was evidence at the trial on issues in the other three actions tending to control the auditor's findings. *Payne* v. *Dexter*, 1.

Certain instructions by a judge to a jury as to the weight to be given to the report of an auditor who under an order of court had heard a case *ex parte*, which were held to be correct. *Ibid.*

Hearing by Judge without Jury.

At the trial of a case before a judge without a jury the admission of incompetent evidence, which the judge states that he afterwards disregarded in his findings of fact, is not to be commended. *Newman* v. *Newman*, 508.

Ordering Verdict.

Improper ordering of a verdict in an action which should have been dismissed. *Brooks* v. *Boston & Northern Street Railway*, 277.

Auditor's report, finding for the plaintiff in the first of four actions of replevin which were tried together, was held not to warrant the ordering of a verdict in that action for the plaintiff where there was evidence at the trial on issues in the other three actions tending to control the auditor's findings. *Payne* v. *Dexter*, 1.

Proper ordering of a verdict for the plaintiff in an action against the maker of a promissory note which, with a second note signed by another person, was

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secured by a single mortgage which had been foreclosed by a sale and the proceeds of the sale applied in full payment of the second note and in part payment of the note in suit. *Boston Safe Deposit & Trust Co.* v. *Manning*, 584.

Where, in an action of contract, it appeared from a report by the trial judge after a verdict had been ordered for the plaintiff following answers of the jury to special questions submitted to them, that the ordering of the verdict was wrong because other issues should have been submitted to the jury, it was held that judgment should be entered for the defendant because the report contained a stipulation that such judgment should be entered if the ordering of the verdict was wrong. *Erickson* v. *George B. H. Macomber Co.* 311.

Conduct of Trial.

Rulings upon evidence.

At the trial of an action against a railroad corporation under St. 1906, c. 463, Part II, § 247, for damages resulting from the burning of a building and certain shade trees of the plaintiff by fire communicated by a locomotive engine of the defendant, where the defendant moved to strike out the answer to a question asked of the plaintiff by his counsel without objection, it was held that the motion properly was denied because the question was asked without objection and the answer was responsive. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

If a judge presiding at a trial admits evidence of the plaintiff which was improper for the jury to consider and in doing so makes to the jury a statement as to its significance which is incorrect, and later in his charge correctly states the law with regard to the significance of the evidence but does not withdraw the evidence from the jury nor expressly withdraw his incorrect statement made when it was admitted, and the jury find for the plaintiff, it cannot be known which statement of the judge the jury followed and therefore an error prejudicial to the defendant has been committed and an exception by him will be sustained. *Lang* v. *Boston Elevated Railway*, 492.

Colloquies.

Language of a judge in a colloquy relating to the *ad damnum* of the writ with counsel after the charge, which was held not to have been beyond his power or prejudicial to the defendant. *Laxton* v. *Hay*, 463.

Requests and rulings.

Proper refusal to make a ruling which correctly stated the law on a matter which had no application to the case on trial. *Green* v. *Nightingale*, 273.

A ruling was held to have been refused properly, because, although correct as an abstract proposition of law, there was no evidence to which it was applicable. *Burke* v. *Hodge*, 156.

A refusal of a judge presiding at the trial of a petition to enforce a mechanic's lien, to rule that a defective statement filed by the petitioner was insufficient as a matter of law to support the petition, was held not to have been shown to have been erroneous where it did not appear from the record that the statement was intended to mislead or that the respondent was misled thereby. *Thompson* v. *Luciano*, 169.

Although some of several witnesses for the plaintiff at the trial of an action

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stated in cross-examination that their testimony in direct examination was not in accordance with the facts and also stated facts favoring the defendant, the presiding judge was held rightly to have refused to rule that the jury would not be warranted in finding the defendant liable upon such witnesses' testimony. *Jones* v. *Boston & Northern Street Railway*, 552.

Question as to the impropriety of an argument of counsel for a plaintiff as to the absence of witnesses whom he contended the defendant could have produced, which was held not to have been raised by an exception to a refusal of the judge to grant a request of the defendant for a ruling that there was no evidence that the defendant had not produced every witness to the accident that it was in its power to produce. *Ibid.*

It is within the discretionary power of a judge presiding at a trial to read to the jury after the close of the charge a ruling which he previously had been asked to give; and there can be no exception to the exercise of that discretion. *Glass* v. *Hazen Confectionery Co.* 99.

Closing argument.

Where, in his closing argument at the trial of an action for personal injuries, the plaintiff's counsel argued in substance that the names of certain witnesses were known to the defendant and that the witnesses had not been called by the defendant because they would have testified to facts favorable to the plaintiff, and it appears that the names referred to were in the possession of a stranger to the litigation so that it was no more the duty or right of the defendant than of the plaintiff to produce them, the question as to impropriety of the argument was held not to have been raised by an exception to a refusal of the judge to grant a request of the defendant for a ruling that there was no evidence that the defendant had not produced every witness to the accident that it was in its power to produce. *Jones* v. *Boston & Northern Street Railway*, 552.

Judge's charge and instructions to jury.

A remark of a presiding judge in submitting special questions to the jury was held to have been proper in the connection in which it was made. *Burke* v. *Hodge*, 156.

Improper admission of evidence which was held not to have been shown to have harmed the party excepting thereto because of instructions of the judge to the jury which must be presumed to have been followed. *Maguire* v. *Pan American Amusement Co.* 22.

Certain instructions by a judge to a jury as to the weight to be given to the report of an auditor who under an order of court had heard a case *ex parte*, which were held to be correct. *Payne* v. *Dexter*, 1.

Special questions to jury.

Where, after a jury have returned answers to questions submitted to them in writing by the presiding judge, the judge orally asks them a further question with regard to a material issue, he should not accept and act upon an answer given orally by only two of the jurymen, neither of whom is the foreman, although there is no contradiction by the other jurymen. *Burke* v. *Hodge*, 156.

Order made by this court in sustaining an exception to such action of the trial judge. *Ibid.*

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Where, in an action of contract, it appeared from a report by the trial judge after a verdict had been ordered for the plaintiff following answers of the jury to special questions submitted to them, that the ordering of the verdict was wrong because other issues should have been submitted to the jury, it was held that judgment should be entered for the defendant because the report contained a stipulation that such judgment should be entered if the ordering of the verdict was wrong. *Erickson* v. *George B. H. Macomber Co.* 311.

Verdict.

Where, in an action for personal injuries by a workman against his employer, in which the plaintiff was allowed to go to the jury on a count at common law and a count under the employers' liability act alleging negligence of a superintendent and the jury returned a general verdict for the plaintiff in the sum of $8,000, it was held that the common law count should not have been submitted to the jury and that, because from the amount of the verdict it was manifest that it was based on the count at common law, there must be a new trial on the count under the statute. *Johnson* v. *Otis Elevator Co.* 504.

New Trial.

Where, in an action for personal injuries the amount of a verdict showed that it was found on a count which should not have been submitted to the jury, a new trial was ordered confined to another count on which there was evidence for the jury. *Johnson* v. *Otis Elevator Co.* 504.

Exceptions.

Matters subject to exception.

It is within the discretionary power of a judge presiding at a trial to read to the jury after the close of the charge a ruling which he previously had been asked to give; and there can be no exception to the exercise of that discretion. *Glass* v. *Hazen Confectionery Co.* 99.

The limiting of the cross-examination of a witness on collateral issues for the purpose of impeaching his credibility is within the discretion of the presiding judge, to the exercise of which no exception lies. *Maguire* v. *Pan-American Amusement Co.* 22.

Whether one, who is a party in only two of four actions which are tried together, has any right of exception in the other two actions, see *Payne* v. *Dexter*, 1.

Insufficient bill.

An exception by a defendant in an action of contract to a refusal by the judge presiding at the trial of the action to rule that on all the evidence the plaintiff was not entitled to recover will not be sustained if the bill of exceptions does not purport to contain the substance of all of the evidence at the trial material to the ruling, although from such evidence as it does contain it may appear that the ruling should have been given. *Savage* v. *Collins*, 472.

Non-prejudicial error.

Admission of testimony which, if assumed to have been error, was held not

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to have been prejudicial to the excepting party because the testimony was immaterial. *Burns* v. *Jones*, 475.

Improper admission of evidence which was held not to have been shown to have harmed the party excepting thereto because of instructions of the judge to the jury which must be presumed to have been followed. *Maguire* v. *Pan-American Amusement Co.* 22.

Whether a judgment dismissing a libel for divorce is a bar to the admission in evidence, at the trial of a libel subsequently filed by the same libellant against the same libellee, of matters testified to at the hearing of the former libel, was not decided because a finding of the trial judge was held to have made any error committed in the admission of the evidence immaterial. *Newman* v. *Newman*, 508.

Error not cured by charge or instructions.

If a judge presiding at a trial admits evidence of the plaintiff which was improper for the jury to consider and in doing so makes to the jury a statement as to its significance which is incorrect, and later in his charge correctly states the law with regard to the significance of the evidence but does not withdraw the evidence from the jury nor expressly withdraw his incorrect statement made when the evidence was admitted, and the jury find for the plaintiff, it cannot be known which statement of the judge the jury followed and therefore an error prejudicial to the defendant has been committed and an exception by him will be sustained. *Lang* v. *Boston Elevated Railway*, 492.

Scope of exceptions.

Question as to impropriety of an argument by plaintiff's counsel as to the absence of witness whom he contended the defendant could have called, which was held not to have been raised by an exception to a refusal of the judge to grant a request of the defendant for a ruling that there was no evidence that the defendant had not produced every witness to the accident that it was in its power to produce. *Jones* v. *Boston & Northern Street Railway*, 552.

Frivolous exceptions.

See *Elkins* v. *Felch*, 534.

Rescript.

Order which was made by this court in an action where exceptions by the plaintiff were sustained to the accepting by the trial judge of oral answers by two jurors only, neither of whom was the foreman, to questions asked by the judge of the jury orally as to the meaning of the jury's answers to seventeen special questions which had been submitted to them in writing. *Burke* v. *Hodge*, 156.

Report.

The only way in which an interlocutory order or decision in an action at law can be brought before this court is by a report of a justice of the Supreme Judicial Court or of the Superior Court under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cotter* v. *Nathan & Hurst Co.* 31.

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A stipulation contained in the report of a case for determination by this court, that if the rulings of the Superior Court were wrong "the case should stand for trial," was held to mean that the case should stand for such disposition as was required by the decision of this court. *Brooks* v. *Boston & Northern Street Railway*, 277.

Where, in an action of contract, it appeared from a report by the trial judge after a verdict had been ordered for the plaintiff following answers of the jury to special questions submitted to them, that the ordering of the verdict was wrong because other issues should have been submitted to the jury, it was held that judgment should be entered for the defendant because the report contained a stipulation that such judgment should be entered if the ordering of the verdict was wrong. *Erickson* v. *George B. H. Macomber Co.* 311.

Where, after a verdict had been ordered for the defendant, a case is reported for determination by this court, the report stating that it was reported "under the usual agreement," and that "It is agreed that if judgment should be entered for the plaintiff it is to be for the sum of $300," it was held that it could not be said that there was any "usual agreement," and that as the plaintiff was entitled to go to the jury and the terms of the report did not indicate plainly what the effect of the determination of this court should be, there should be a new trial. *Roberts* v. *Anheuser Busch Brewing Association*, 449.

Appeal.

Under R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4, providing for appeals from judgments of the Superior Court, no appeal can be taken before a final judgment. *Cotter* v. *Nathan & Hurst Co.* 31.

On an appeal from a judgment entered for the plaintiff in an action where, in accordance with a rescript of this court, upon an allowance of an amendment to the declaration the defendant's exceptions were overruled and the judgment appealed from entered, the defendant cannot again be heard upon matters decided when the case previously was before the court. *Lemay* v. *Springfield Street Railway*, 138.

PRACTICE, CRIMINAL.

Trial for two Offenses.

The rule of Commonwealth *v.* Bickum, 153 Mass. 386, that a defendant, against his objection, cannot be tried at one time upon two separate complaints charging two distinct crimes committed at different times, is not to be extended. *Commonwealth* v. *Rosenthal*, 50.

A trial judge in his discretion may require that a defendant, against his objection, shall be tried at one time upon two indictments, one under R. L. c. 212, § 2, as amended by St. 1910, c. 424, § 1, charging him with enticing away a certain girl on a certain day for the purpose of unlawful sexual intercourse, and the other under R. L. c. 212, § 10, charging him with committing adultery with the same girl at the same place on the same day. *Ibid.*

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Trial alone of one of two Defendants jointly indicted.

An indictment against two defendants for conspiracy to steal money can be tried against one of the defendants alone in the absence of his alleged co-conspirator in parts unknown. *Commonwealth* v. *MacKenzie*, 578.

Conduct of Trial.

At the trial of an indictment for conspiracy as in other trials the order in which evidence shall be allowed to be introduced is within the discretion of the presiding judge. *Commonwealth* v. *MacKenzie*, 578.

Brief before Full Court.

Violation of Rule 2 of the rules for the regulation of practice before the full court, requiring that each brief filed shall begin with a concise statement of the case, which did not result in an improper brief for the Commonwealth being stricken from the files and record, the court stating that in passing upon the case the statement contained in the brief was wholly disregarded. *Commonwealth* v. *Marshall*, 86.

PRESCRIPTION.

Establishment of a public way in Connecticut by prescription. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.

If the edge of a sidewalk of a public way of a town, which extends one inch beyond the limits of the way, has been wrought and maintained by the town and used by the public as a portion of the travelled part of the way for more than twenty years, the town is bound to keep it in repair. *Barron* v. *Watertown*, 46.

PROBATE COURT.

Jurisdiction.

One named as a legatee in a will offered for probate, whose legacy is revoked by the terms of a codicil offered for probate with the will, is a necessary party to a compromise of a controversy concerning the will and codicil under R. L. c. 148, § 15; St. 1903, c. 222, and the Probate Court has no jurisdiction to authorize such a compromise against the objection of such person. *Sherman* v. *Warren*, 288.

Parties.

On an appeal by trustees of a trust established by deed from a decree of the Probate Court granting a petition under R. L. c. 147, § 20, by an administrator of the estate of one unaccountably absent for more than seven years for the liquidation and distribution of the trust fund, it appeared that the time had arrived for the distribution of the fund but that the petitioner was entitled to no part of it; and the decree of the Probate Court therefore was reversed and it was ordered that the petition be dismissed unless the Probate Court allowed the parties entitled to share in the distribution to intervene. *Whitwell* v. *Bartlett*, 238.

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Decree.

What is the proper decree which should be entered by a single justice of the Supreme Judicial Court in disposing of an appeal from a decree of the Probate Court upon a petition of a trustee under R. L. c. 162, § 5, for instructions. *Burroughs* v. *Wellington*, 494.

A decree of a Probate Court made upon the account of a deceased administrator, determining the amount due from the estate of such deceased administrator to the estate of his intestate, is conclusive in a suit in equity brought by a successor of the deceased administrator against a bank, seeking to hold it liable for certain funds of the estate of the intestate embezzled by the deceased administrator. *Allen* v. *Puritan Trust Co.* 409.

Where, in a case in which the Probate Court has jurisdiction of the subject matter and of the parties, that court makes a decree approving an agreement of compromise under St. 1907, c. 447, and there is no appeal from the decree, the question whether the Probate Court in approving the agreement rightly interpreted the statute is not open in any further proceedings in that case. *Bartlett* v. *Slater*, 334.

A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard from for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead," was held not to be such an adjudication either of the fact or of the date of the death as to render inadmissible evidence on those issues at a hearing upon a petition filed by the administrator for a distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed. *Whitwell* v. *Bartlett*, 238.

Appeal.

On an appeal by trustees of a trust established by deed from a decree of the Probate Court granting a petition under R. L. c. 147, § 20, by an administrator of the estate of one unaccountably absent for more than seven years for the liquidation and distribution of the trust fund, it appeared that the time had arrived for the distribution of the fund but that the petitioner was entitled to no part of it, and the decree of the Probate Court therefore was reversed and it was ordered that the petition be dismissed unless the Probate Court allowed the parties entitled to share in the distribution to intervene. *Whitwell* v. *Bartlett*, 238.

A trustee under a will and a guardian *ad litem* appointed to represent the absentee and others in proceedings under St. 1905, c. 326, for the appointment of trustees and the distribution of property held by the trustee under the will for an absent beneficiary who has been unheard of for more than fourteen years, have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution. *Adams* v. *Adams*, 198.

On an appeal to the Supreme Judicial Court from a decree of the Probate Court upon a petition of a trustee under R. L. c. 162, § 5, for instructions, the decree is not suspended nor are proceedings under it stayed and the case should not be dealt with as a proceeding brought originally in the Supreme Judicial Court, the only question before the Supreme Judicial Court being, whether the decree of the Probate Court was wrong for any of the reasons assigned as objections to the decree; and the decree to be entered by the

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single justice should determine that question only and should remand the case to the Probate Court for further proceedings. *Burroughs* v. *Wellington*, 494.

Petition for Instructions.

On a petition for instructions by a trustee under a will, the trustee is entitled to instructions only as to his present duties. *Wheaton* v. *Batcheller*, 223.

A petition in the Probate Court under R. L. c. 162, § 5, by a trustee for instructions regarding the trust is a proceeding in equity and is governed by the rules of equity pleading and practice. *Burroughs* v. *Wellington*, 494.

Where, after all parties interested in such a petition have appeared and answered and a hearing has been had and a decree is ready for signature but has not been entered, the trustee files a motion "to dismiss" or for leave to withdraw the petition, the judge within his discretion may deny the motion and an appeal from such action is without merit. *Ibid.*

What is open on an appeal from a decree of the Probate Court in such a petition. *Ibid.*

Compromise of Controversy as to Allowance of Will.

Necessary parties to a compromise under R. L. c. 148, § 15; St. 1903, c. 222 of a controversy as to the allowance of a will. *Sherman* v. *Warren*, 288.

Where, in a case in which the Probate Court has jurisdiction of the subject matter and of the parties, that court makes a decree approving an agreement of compromise under St. 1907, c. 447, and there is no appeal from the decree, the question, whether the Probate Court in approving the agreement rightly interpreted the statute, is not open in any further proceedings in that case. *Bartlett* v. *Slater*, 334.

Proceedings as to Absent Beneficiary of Trust.

A trustee under a will and a guardian *ad litem* appointed to represent the absentee and others in proceedings under St. 1905, c. 326, for the appointment of trustees and the distribution of property held by the trustee under the will for a beneficiary who has been unheard of for more than fourteen years, have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution. *Adams* v. *Adams*, 198.

Such absentee proceedings are constitutional. *Ibid.*

Petition under R. L. c. 147, § 20, by the administrator of the estate of one unaccountably absent for more than seven years, for the liquidation and distribution of a trust fund created by deed. *Whitwell* v. *Bartlett*, 238.

PUBLIC OFFICER.

A tree warden is a public officer, whose duties are established by statute, and in the performance of those duties he does not act as the servant or agent of the town or city in which he is appointed. *Donohue* v. *Newburyport*, 561.

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RAILROAD.

Duty toward Licensee.

A railroad company was held to owe no duty other than to refrain from wanton or wilful misconduct to a member of the general public who used a crossing at grade over its railroad on a private way which was wholly within land of a private owner and was maintained at such owner's expense, the company not having planked the crossing nor made graded approaches to it nor maintained a sign or flagman there, and it not appearing that any of the railroad company's officers or agents knew that the general public ever used the way. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.

Duty to Repair Crossing of Public Way.

A railroad corporation, which under R. L. c. 111, § 129, is bound to keep in repair the portion of a public way crossed by its road at grade, was held under the circumstances not to be liable under the highway act for injuries to a boy caused by his foot catching between one of the rails of the track and the planking at such a crossing when he was running a race with his companions. *Harris* v. *Boston & Maine Railroad*, 573.

Liability for Fire.

Under St. 1906, c. 463, Part II, § 247, where a building has been destroyed by fire communicated by a locomotive engine of a railroad corporation, such corporation is liable to the owner of the building for the fair value of the building at the time of the fire, and not merely for its market value when that would not indemnify the owner for his loss. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

The evidence at the trial of an action against a railroad corporation under that statute for damages resulting from the destruction by fire alleged to have been communicated by a locomotive engine of the defendant of a two story wooden tenement house owned by the plaintiff was held to warrant a finding for the plaintiff. *Ibid.*

In such an action, a question asked of the plaintiff as to the damage to the real estate by reason of the destruction of certain shade trees, and the answer thereto, were held properly to have been admitted in evidence. *Ibid.*

In such an action it is proper to exclude questions as to the value of limited portions of the plaintiff's land before and after the fire. *Ibid.*

Rights in Real Estate.

Under R. L. c. 128, § 18, as amended by St. 1905, c. 429, § 2, the Land Court may register the title to an estate in fee in land under a railroad location, although the rights of the railroad corporation, assuming them to have been acquired by eminent domain, are substantially permanent and practically exclusive so long as the land is used for the purposes of a railroad. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

In the construction of a deed conveying land to a railroad corporation and containing a granting clause and a habendum clause in the usual and proper terms to convey the land in fee and, after the description of the land, the

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following clause, "It is hereby intended to convey the above premises to the said railroad company to be used for a public road and depot and railroad purposes only," it was held that the land was conveyed to the railroad corporation unconditionally in fee simple, and did not revert when the corporation ceased to use it for railroad purposes. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

The acquisition by an adverse user extending from 1868 to 1908 of a right of way running longitudinally over and along a portion of land comprised in a location granted to a railroad corporation by county commissioners in 1845 is not prevented by St. 1861, c. 100, which has remained in force and now is contained in St. 1906, c. 463, Part II, § 80. *Hall* v. *Boston & Maine Railroad*, 174.

Liability to Passengers.

See NEGLIGENCE, *Railroad*, Passenger.

RELEASE.

In an action of tort against three joint tortfeasors, covenants not to sue given by the plaintiff to two of the three defendants do not release the third defendant from liability. *Matheson* v. *O'Kane*, 91.

A father who has acted as next friend for his minor son in an action by the son for personal injuries, after a judgment for the plaintiff has been entered and execution has issued and has been satisfied, has no authority to settle a controversy with the attorney at law who conducted the action as to the amount to be deducted by the attorney for his services out of the money collected by him upon the execution, or to give in behalf of the minor a release of the attorney from all claims. *Blake* v. *Corcoran*, 406.

REPLEVIN.

Determination of various questions which arose at the trial together of four actions of replevin relating to the title to certain fish. *Payne* v. *Dexter*, 1.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard of for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead," was held not to be such adjudication either of the fact or of the date of the death as to render inadmissible evidence on those issues at a hearing upon a petition filed by the administrator for distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed. *Whitwell* v. *Bartlett*, 238.

See also that subtitle under EQUITY JURISDICTION.

REVERE.

Under the provisions of St. 1904, c. 457, § 1, that the town of Revere might supply with water itself and its inhabitants and such inhabitants of the town

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of Saugus as then were supplied or might thereafter "make application to be supplied with water under the provisions of" St. 1889, c. 382, § 7, and that it might "regulate the use of such water and fix and collect rates to be paid for the use of the same," the town of Revere was given full and unqualified power to fix the rates to be paid for water furnished to inhabitants of Saugus. *Merrill* v. *Revere*, 468.

RULES OF COURT.

Rule 2 of the rules for the regulation of practice before the full court, see *Commonwealth* v. *Marshall*, 86.

Divorce Rule 9, see *Newman* v. *Newman*, 508.

SALE.

Validity.

At the trial of an action of replevin for the possession of certain fish, evidence, tending to show that one member of a partnership in the fish business purchased the fish for the partnership and resold them to the plaintiff, was held to warrant a submission of the case to the jury although there was in evidence an auditor's report finding for the defendant and evidence that the other partner, without the knowledge of the first partner, had made an agreement to manage the business of procuring fish for the defendant in the neighborhood where the transaction occurred. *Payne* v. *Dexter*, 1.

The fact, that one of two partners in purchasing certain property for the partnership used funds which without the knowledge of his partner he had embezzled from a third person, was held not to be material on the question of the validity of a sale of the property by the innocent partner for the partnership. *Ibid.*

In an action of replevin for the possession of certain fish, the question, whether a sale of the fish on a Lord's day to the plaintiff by one of two partners who owned them was valid, was held not to be material where it appeared that the plaintiff relied, to prove his title, solely on a bill of sale subsequently given to him on a secular day by the other partner acting for the partnership. *Ibid.*

At the trial of an action where the validity of a bill of sale by one of two partners purporting to act for the partnership was an issue, it was held that the mere fact, that before the sale the other partner informed a representative of the vendee that no partnership existed, did not as a matter of law make the conveyance of no effect. *Ibid.*

The mere fact, that, previous to the execution of a bill of sale of certain personal property by one of two partners purporting to act for the partnership, a representative of the vendee, being informed that the other partner denied the existence of the partnership, had caused the property to be attached as such other partner's individual property, was held not to estop the vendee from denying that the property belonged solely to such partner. *Ibid.*

Unintentional error in a published notice of a foreclosure sale of real estate which was held not to have invalidated the sale. *Turansky* v. *Weinberg*, 324.

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Of Shares in Corporation.

Effect and operation of a custom, that a certificate of shares in a corporation, accompanied by an instrument of power of transfer signed in blank by the person named in the certificate as the owner, in the possession of a person who is known and is of good reputation, "if the signature is guaranteed by a stock exchange house," is treated as "capable of good transfer and delivery by such holder for sale or pledge." *Baker* v. *Davie*, 429.

Action against a stockbroker by a customer for the amount of a dividend upon certain shares of stock which the defendant had sold with the "dividend on" after the dividend had been declared and before it was payable, in which material issues, upon which ample instructions were given to the jury, were, whether there was a custom of brokers that the broker had authority to sell with the "dividend on" and whether in order to carry out the plaintiff's instructions to sell the stock for the price named it was necessary to sell with the "dividend on." *Cronan* v. *Hornblower*, 538.

Of Dangerous or Injurious Substance.

Action under R. L. c. 102, § 108, and at common law, for personal injuries alleged to have resulted from an explosion of naphtha sold under an assumed name and sold negligently. *Gately* v. *Taylor*, 60.

Action of tort against a manufacturer for injuries to the plaintiff's wife and child caused by their using a preparation of malt purchased in a sealed bottle from a druggist to whom it had come through a wholesale dealer from the defendant, who had represented as of his own knowledge by public advertisements that it was a healthful mixture, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment. *Roberts* v. *Anheuser Busch Brewing Association*, 449.

Statutes regulating Sales.

A statute requiring that all goods made by convict labor in a penal institution in this or any other State, before being sold in this Commonwealth, shall be marked in such a way as to indicate conspicuously the source of their manufacture, which by its terms plainly applies to interstate commerce, would be in violation of the Constitution of the United States. *Opinion of the Justices*, 605.

A statute, forbidding any person engaged in the production or distribution of a commodity in general use to discriminate in the price of such commodity between different parts of the Commonwealth or between different purchasers either maliciously or for the purpose of destroying the business of a competitor and of creating a monopoly, and also prohibiting combinations formed for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly, is within the police power of the Legislature, and, as it affects interstate commerce only indirectly, is not in violation of art. 1, § 8, of the Constitution of the United States. *Opinion of the Justices*, 620.

SAUGUS.

Under the provisions of St. 1904, c. 457, § 1, that the town of Revere might supply with water itself and its inhabitants and such inhabitants of the town

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of Saugus as then were supplied or might thereafter "make application to be supplied with water under the provisions of" St. 1889, c. 382, § 7, and that it might "regulate the use of such water and fix and collect rates to be paid for the use of the same," the town of Revere was given full and unqualified power to fix rates to be paid for water furnished to inhabitants of Saugus. *Merrill* v. *Revere*, 468.

SAVINGS BANK.

Officers and Agents.

The powers of the investment committee of a savings bank in relation to the bank and its depositors are limited not only by the provisions of the statutes but also by the by-laws of the bank. *Greenfield Savings Bank* v. *Abercrombie*, 252.

The members of the investment committee of a savings bank in this Commonwealth are liable to the bank and its depositors for losses incurred from the making of loans largely in excess of the limit imposed by St. 1894, c. 317, § 21, cl. 1, of which they might have known "by the exercise of a reasonable degree of care and prudence." *Ibid.*

Construction of the requirements of §§ 21, 24, of that statute. *Ibid.*

Although a loan made without the observance of those requirements may be valid as between the bank and the borrower or as to third parties, its making is beyond the powers of the investment committee of the bank as between them and the bank and its depositors, and constitutes a wrongful diversion of the funds of the bank, for which the members of such committee are liable. *Ibid.*

Suit in equity to enforce the rights of the bank to compel reimbursement by members of the investment committee in such case. *Ibid.*

In such a suit the defendants stand in the relation of trustees toward the bank and its depositors, and consequently the statute of limitations begins to run against the bank only from the time that it learned of the defendants' wrongdoing. *Ibid.*

Taxation.

A savings bank is not subject to an excise tax under St. 1909, c. 490, Part III, § 21, computed upon the average amount of its deposits for a period of six months during which the bank commissioner had taken and retained possession of its property and business under authority of St. 1910, c. 399, but had not published or sent out notice for the presentation of claims against the bank in accordance with § 8 of that statute. *Greenfield Savings Bank* v. *Commonwealth*, 207.

Assignment of Account.

If a depositor in a savings bank delivers to another person his bank book and an order in writing on the bank to pay to such person the amount standing to the depositor's credit with the bank, a valid assignment and transfer of the deposit is effected and the transferee receives a complete title thereto which the bank is bound to recognize although the book and the order are presented two hours after the depositor's death and the bank has notice of the death. *Brannan* v. *Eliot Five Cents Savings Bank*, 532.

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SCHOOLS AND SCHOOL COMMITTEES.

Action by a school girl against a city under R. L. c. 44, § 7, for the alleged unlawful exclusion of the plaintiff from the defendant's schools, in which it was held that the jury were warranted in finding that certain action of the school committee amounted to a permanent exclusion of the plaintiff without a hearing, and in finding for the plaintiff. *Jones* v. *Fitchburg*, 66.

SHADE TREES.

Action to enforce the liability of a railroad corporation under St. 1906, c. 463, Part II, § 247, for damage to the plaintiff's buildings and shade trees caused by fire communicated from a locomotive engine of the defendant. *Hammond* v. *New York, New Haven, & Hartford Railroad*, 549.

SHIP.

See CHARTER PARTY.

SMALL LOANS ACT.

The provisions of R. L. c. 102, § 51, relating to the discharge of a loan of less than $1,000 by the payment or tender of the principal actually borrowed, interest at the rate of eighteen per cent per annum and not more than $5 for actual expenses of making and securing the loan, apply to all loans, whether secured or unsecured. *Shawmut Commercial Paper Co.* v. *Brigham*, 72.

In an action by a money lender upon a promissory note given in settlement of a previous note which he had received in a certain usurious loan transaction, it was held that the defendant could not rely on R. L. c. 102, § 51, because when he settled the usurious claim he had failed to take advantage of the right given to him by that statute. *Ibid.*

SNOW AND ICE.

Woman, who when walking on a sidewalk of a city street saw a mass of snow and ice fall on the sidewalk in front of her, paused and, receiving no further warning, proceeded on her course and was struck and injured by a mass of snow thrown from the roof of a building by a servant of the occupant of the building, was held not to have been negligent as matter of law. *Mallen* v. *James A. Houston Co.* 298.

St. 1908, c. 305, does not cause certain sections of the highway act, in so far as they relate to notices of injuries resulting from snow or ice, to apply to an action against the occupant of a building for injuries caused by snow negligently thrown from the roof of such building by a servant of such occupant. *Ibid.*

STATUTE.

Construction.

Where, in a case in which the Probate Court has jurisdiction of the subject matter and of the parties, that court makes a decree approving an agreement of compromise under St. 1907, c. 447, and there is no appeal from the decree,

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the question whether the Probate Court in approving the agreement rightly interpreted the statute is not open in any further proceedings in that case. *Bartlett* v. *Slater*, 334.

R. L. c. 185, § 7, providing that any one who wilfully cuts down, carries away, girdles or otherwise destroys any trees, timber, wood or underwood on the land of another without license and without good reason to believe that the land was his own or that he was authorized so to do, shall be liable to the owner in an action of tort for three times the amount of damages assessed therefor, is remedial and not penal. *Palmer* v. *Davidson*, 556.

Codification or Revision.

In a statute which is a codification or revision of previous legislation, titles or headings prefixed to subdivisions of a chapter can have no effect to change the meaning of the statutes included in the codification or revision unless such change plainly was intended by the Legislature. *Shawmut Commercial Paper Co.* v. *Brigham*, 72.

Accordingly, St. 1888, c. 388, was held not to have been amended when codified in R. L. c. 102, § 51. *Ibid.*

Retroactive.

St. 1905, c. 326, relating to proceedings for the disposition of the interest of a beneficiary under a trust who has been unheard of for more than fourteen years, is not invalid by reason of the provision in § 10 that it shall apply to existing trusts. *Adams* v. *Adams*, 198.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 741.

STOCKBROKER.

Suit in equity for the determination of the rights of various persons in certain shares of stock in a corporation, where it appeared that the owner had placed his certificate of stock indorsed in blank in the hands of a stockbroker with an instrument of power of transfer, that the stockbroker dishonestly had delivered the certificate to a bank in pledge, that the owner by reason of a custom was estopped to deny the bank's title and that thereafter the dishonest stockbroker had made various transfers to other persons of his "right, title and interest" in the shares subject to the rights of the bank. *Baker* v. *Davie*, 429.

Action against a stockbroker by a customer for the amount of a dividend upon certain shares of stock which the defendant had sold with the "divi-

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dend on" after the dividend had been declared and before it was payable, in which material issues, upon which ample instructions were given to the jury, were, whether there was a custom of brokers that the broker had authority in such a case to sell with the "dividend on," and whether in order to carry out the plaintiff's instructions to sell the stock for the price named it was necessary to sell with the "dividend on." *Cronan* v. *Hornblower*, 538.

STREET RAILWAY.

The court took judicial notice of the fact that cars in the Boston subway stop only at fixed stations, see *Bursteen* v. *Boston Elevated Railway*, 459.

It is right for the conductor of a surface car, which has started from a station in the Boston subway and has moved about two feet with another car coming about twenty feet behind it, to refuse to stop the car or to allow a passenger to leave it in order that the passenger may recover a valuable violin, which in its case has slipped from under his arm and has fallen from the car. *Ibid.*

It is the duty of a corporation operating passenger cars in a tunnel, not only to use care to see that its servants manage properly the machinery for closing the sliding doors of its cars by which the passengers enter, but also to use care to see that no stranger starts such machinery so as to cause injury to a passenger. *Craft* v. *Boston Elevated Railway*, 374.

Actions against street railway companies for personal injuries to passengers and others, see NEGLIGENCE, *Street Railway*.

STRIKE.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff by means of an unlawful strike which compelled the plaintiff's superior to leave the question, whether he should discharge the plaintiff, to a vote of the workmen, a majority of whom voted for his discharge, the plaintiff is entitled to relief against the defendants who instigated and maintained the strike and not merely against those workmen who voted for his discharge. *Hanson* v. *Innis*, 301.

In such suit the plaintiff was held to be entitled to recover damages not only for his loss of wages due to his discharge but also, once for all, for his present and prospective inability to recover employment, which might continue for an indefinite time, caused by the unlawful acts of the defendants. *Ibid.*

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

An incorporated bar association which as petitioner institutes a proceeding for disbarment is not a party to the suit and consequently honorary membership in such petitioning association does not disqualify a judge from sitting in the case. *Boston Bar Association* v. *Casey*, 187.

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Power of the Superior Court to grant a petition for alimony filed by a libellant for divorce after an absolute decree of divorce has been entered, where the only service of the libel for divorce was by mail, but notice of the petition for alimony was served upon the libellee personally. *Parker* v. *Parker*, 139.

The only way in which an interlocutory order or decision in an action at law can be brought before this court is by a report of a justice of the Supreme Judicial Court or of the Superior Court under R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cotter* v. *Nathan & Hurst Co.* 31.

SUPREME JUDICIAL COURT.

Whether under c. 3, art. 2 of the Constitution the Governor alone can require the opinions of the Justices in regard to a bill laid before him for his revisal under c. 1, § 1, art. 2 of the Constitution, was referred to as a question left open for future consideration. *Opinion of the Justices*, 620.

Without considering whether under c. 3, art. 2 of the Constitution the Council without the concurrence of the Governor may require the opinions of the Justices, the Justices declined to answer a question addressed to them by the Council where it did not appear to what, if any, pending matter the question related. *Answer of the Justices*, 630.

Violation of Rule 2 of the rules for the regulation of practice before the full court, requiring that each brief filed shall begin with a concise statement of the case, which did not result in the improper brief being stricken from the files and record, the court stating that in passing upon the case the statement contained in the brief was wholly disregarded. *Commonwealth* v. *Marshall*, 86.

On appeal to the Supreme Judicial Court from a decree of the Probate Court upon a petition by a trustee under R. L. c. 162, § 5, for instructions, the decree is not suspended nor are proceedings under it stayed, and the case should not be dealt with as a proceeding brought originally in the Supreme Judicial Court, the only question before the Supreme Judicial Court being, whether the decree of the Probate Court was wrong for any of the reasons assigned as objections to the decree; and the decree to be entered by the single justice should determine that question only and should remand the case for further proceedings. *Burroughs* v. *Wellington*, 494.

SURETY.

In an action against the sureties on a bond of a building contractor, it was held that neither a certain payment by the owner to the contractor, nor the employment of the contractor as a superintendent in the completion of the contract for the owner after default by the contractor in any way released the sureties; and the expense for which the owner could have reimbursement under the provisions of the bond was determined. *Museum of Fine Arts* v. *American Bonding Co.* 124.

It was held that neither a negligent failure of the surety on the bond of a dishonest administrator to require the administrator properly to perform his duties, nor certain relations of the surety with the administrator's successor were a defense to a suit in equity by such successor against a bank to follow funds embezzled by the administrator. *Allen* v. *Puritan Trust Co.* 409.

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TAX.

Assessment.

Affirmation of the rule as to the taxation of land in this Commonwealth adjoining the boundary line of Rhode Island through which flowed a river with a fall in both States furnishing a valuable water power applied in a power house erected in Rhode Island, that the value of the property should be determined in reference to any and all uses to which it was adapted, including the furnishing of power to be used on the petitioner's wheels in Rhode Island. *Blackstone Manuf. Co.* v. *Blackstone*, 14.

In determining such valuation for the purposes of taxation, it cannot be said as a matter of law that it is improper to use as a determining factor the relative fall of the water in each State. *Ibid.*

And the law of Rhode Island with relation to mills and mill privileges is not material in determining such valuation. *Ibid.*

A transfer of personal property held by an executor to himself as trustee does not become a distribution making the property no longer assessable to the executor, within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, until the executor's account showing the transfer has been allowed by the Probate Court. *Welch* v. *Boston*, 178.

Betterment.

An agreement made on July 3, 1899, by the grantor in a deed of a lot of land "to pay any assessment which may lawfully be made under" a vote of the board of street commissioners of Boston in 1895 to widen and extend Huntington Avenue in accordance with the provisions of St. 1894, c. 416, "for payment of which any lien now exists on said lot," is not an agreement to pay an assessment for a betterment tax made under the provisions of St. 1902, c. 527, after assessments for the work under St. 1894, c. 416, had been declared invalid. *Campbell* v. *Haven*, 121.

Excise.

A savings bank is not subject to an excise tax under St. 1909, c. 490, Part III, § 21, computed upon the average amount of its deposits for a period of six months during which the bank commissioner had taken possession of its property and business under authority of St. 1910, c. 399, but had not published or sent out notice for the presentation of claims against the bank in accordance with § 8 of that statute. *Greenfield Savings Bank* v. *Commonwealth*, 207.

On Successions and Inheritances.

Under St. 1907, c. 563, § 1, now St. 1909, c. 490, Part IV, § 1, relating to the taxation of legacies and successions, in determining whether a "bequest, devise or distributive share of an estate" exceeds in value the limit of exemption fixed by the statute, the tax commissioner of the Commonwealth has no right to take into account the amount received by the legatee, devisee, or distributee from property situated in another State. *Attorney General* v. *Barney*, 134.

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Abatement.

One who has filed a list of personal property with the assessors of a town or city is not precluded from maintaining a petition for the abatement of the whole of the tax assessed upon such property. *Welch* v. *Boston*, 178.

Assessors are not proper parties respondent to a petition under St. 1909, c. 490, Part I, § 77, appealing to the Superior Court from the refusal of the assessors of a town or city to abate a tax. *Ibid.*

TOWNS.

See Municipal Corporations.

TRADE UNION.

See Labor Union.

TREE.

R. L. c. 185, § 7, providing that one who wilfully cuts down, carries away, girdles or otherwise destroys any trees, timber, wood or underwood on the land of another without license and without good reason to believe that the land was his own or that he was authorized so to do, shall be liable to the owner in an action of tort for three times the amount of damages assessed therefor, is remedial and not penal. *Palmer* v. *Davidson*, 556.

Construction of the word "wilfully" as used in that statute. *Ibid.*

In an action under that statute evidence offered by the defendant to show that in cutting certain trees he believed that he had a right to do so, was held rightly to have been excluded. *Ibid.*

In an action by an administrator against a city under R. L. c. 51, § 17, for the loss of life of the plaintiff's intestate by reason of an alleged defect in a highway of the defendant consisting of a dangerous tree which fell upon the plaintiff's intestate as it was being taken down by the tree warden, it was held that the question, whether the tree had been a menace to travel for a sufficient length of time to constitute a reasonable notice to the defendant, is one of fact for the jury. *Donohue* v. *Newburyport*, 561.

TREE WARDEN.

A tree warden is a public officer, whose duties are established by statute, and in the performance of those duties he does not act as the servant or agent of the town or city in which he is appointed. *Donohue* v. *Newburyport*, 561.

TRESPASS.

Actions for personal injuries to trespassers, see Negligence, *Trespasser.*

TRUST.

What constitutes.

A bequest of a residue to one who was not a relative of the testator "to be used as far as necessary for the support" of an aunt of the testatrix, was held

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Trust (continued).

under the circumstances to be a bequest in trust, so that after the death of the aunt whatever remained of the trust fund should be disposed of as intestate property. *Woodbury* v. *Hayden*, 202.

Oral Trust.

Where a brother, who when insolvent received certain mortgages of real estate by inheritance from a sister who had refrained from making a will because he orally had promised her that he would distribute her estate in accordance with her wishes, executes the oral trust by transferring the property, a trustee in bankruptcy of his estate afterward appointed cannot follow such property, the statute of frauds not preventing the proof of the oral trust which had been fully executed. *Bailey* v. *Wood*, 37.

Where one, who holds the equity of redemption in certain real estate subject to a mortgage, inherits such mortgage as the sole heir and next of kin of its owner, but takes the mortgage with other property subject to an oral trust which he executes in full, the existence of the trust prevents the extinguishment of the mortgage by merger. *Ibid.*

Construction.

New trustees appointed to succeed those named in a certain will were held to have the same discretionary power as that given by the will to their predecessors. *Shattuck* v. *Stickney*, 327.

The word "accumulation," as used in a clause in a will giving to trustees power in their discretion to pay to a certain beneficiary "any part or the whole of the accumulation of said trust," was held to mean the trust fund as accumulated, including both the original principal and the increase from additions of income. *Ibid.*

Construction of a trust under a will directing that the income after the death of the testator's wife should be paid "to and among my children" with certain provisions for the division of the income and principal on the deaths, as they occurred, with or without issue, of the children and the survivor of them. *Wheaton* v. *Batcheller*, 223.

Construction of an article of a will which began "After my deceas," and provided that certain real estate should be held in trust for an improvident son of the testator during his life, and "at his deth all this property is to be equally devided between my surviving children" and the son's daughter. *Spencer* v. *Adams*, 291.

Powers of Trustee.

New trustees appointed to succeed those named in a certain will were held to have the same discretionary power as that given by the will to their predecessors. *Shattuck* v. *Stickney*, 327.

Duty of Trustee as to Recording Deed.

A trust company, holding as trustee under an agreement in writing assignments of mortgages of real estate to secure the debenture bonds of an investment company, was held not to be liable to the bondholders for a loss suffered from fraudulent acts of officers of the investment company which were made possible by the failure of the company to record the assignments of the

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mortgages, it appearing that under the trust deed and the circumstances the company was under no duty to record the assignments. *Partridge* v. *American Trust Co.* 194.

Duties of Trustee under Compromise Agreement.

In a suit in equity by the trustees named in a will for instructions as to their duty, under an agreement of compromise approved by the Probate Court in regard to selling certain securities of an estimated value of more than $6,000,000 and constituting more than half of the trust fund, where the trustees alleged that the compromise agreement had become unworkable, certain findings and rulings made and an interlocutory decree ordered by a single justice were held on an appeal by the defendants to have been proper. *Bartlett* v. *Slater*, 334.

Taxation.

A transfer of personal property held by an executor to himself as trustee does not become a distribution making the property no longer assessable to the executor, within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, until the executor's account showing the transfer has been allowed by the Probate Court. *Welch* v. *Boston*, 178.

Proceedings as to Absent Beneficiary.

A trustee under a will and a guardian *ad litem* appointed to represent the absentee and others in proceedings under St. 1905, c. 326, for the appointment of trustees and the distribution of property held by a trustee under a will for a beneficiary who has been absent for more than fourteen years, have interests which entitle them to appeal from a decree of the Probate Court ordering such distribution. *Adams* v. *Adams*, 198.

Such absentee proceedings are constitutional. *Ibid.*

A decree of the Probate Court which, in granting a petition for the administration of the estate of one who unaccountably had been absent and had not been heard of for more than seven years, recited that on a date seven years after his disappearance "a presumption arose that" he "was dead," was held not to be such adjudication either of the fact or the date of the death as to render inadmissible evidence on those issues at a hearing upon a petition filed by the administrator for the distribution under R. L. c. 147, § 20, of the funds of a trust established by a deed. *Whitwell* v. *Bartlett*, 238.

On an appeal by trustees of a trust established by deed from a decree of the Probate Court granting a petition under R. L. c. 147, § 20, by an administrator of the estate of one unaccountably absent for more than seven years, for the liquidation and distribution of the trust fund, it appeared that the time had arrived for the distribution of the fund but that the petitioner was entitled to no part of it; and the decree of the Probate Court therefore was reversed and it was ordered that the petition be dismissed unless the Probate Court allowed the proper parties to intervene. *Ibid.*

TRUSTEE PROCESS.

The statutes of this Commonwealth providing for the attachment of goods by trustee process, as applied to charging a carrier engaged in interstate

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Trustee Process (*continued*).

commerce as the trustee of the owner of goods in the hands of the carrier for immediate transportation to another State, are not unconstitutional. *Rosenbush* v. *Bernheimer*, 146.

A carrier, having cases of goods lying on a wharf in his hands for immediate transportation to their owner as consignee, may be charged in trustee process as trustee of such owner. *Ibid.*

A carrier may be charged in trustee process as the trustee of the owner of goods, which are in his hands for transportation to such owner as consignee, although when the writ was served the goods were packed in cases and the carrier knew of the contents of the cases only by information, if it appears that the goods were of value and belonged to the defendant. *Ibid.*

Where the answer of one summoned as trustee by trustee process discloses property of the defendant in his hands, it cannot be assumed in his favor that his pecuniary interests will be affected adversely by charging him as trustee, if this does not appear from the statements in his answer or from facts agreed or proved outside the answer. *Ibid.*

UNDUE INFLUENCE.

Findings of a master in a suit in equity by a brother and sister against their sister to set aside a deed of real estate made by the mother of all the parties to the defendant alone, that the defendant and the plaintiff sister "connived together to induce their mother to make a will in their favor to the exclusion of" the plaintiff's brother, that the mother "was unduly influenced by them," and that, although of her own volition she suggested a deed instead of a will, she "was nevertheless affected" by such undue influence when she executed the deed, were held to be findings that the execution of the deed was procured by undue influence. *Lyons* v. *Elston*, 478.

In such a suit it was held that the fact that the daughters were excluded from the room during a conference between an attorney and the mother when directions for making the deed were given, is not inconsistent with a finding that the deed was procured by the undue influence of the daughters. *Ibid.*

In such a suit it also was held that the fact that the mother was "in full possession of all her mental faculties" was not inconsistent with such a finding. *Ibid.*

In such a suit it was held that under the circumstances, although the plaintiff brother was entitled to a decree, the plaintiff sister did not come into court with clean hands and could not have the aid of a court of equity to relieve her from the harmful consequences of a wrong in which she had participated. *Ibid.*

UNFAIR COMPETITION.

Suit in equity by a manufacturer of toothpicks to restrain the defendant, a wholesale dealer in toothpicks, from selling goods in packages which the defendant, for the purpose of acquiring as far as possible the plaintiff's customers and trade, deliberately had made in imitation of a distinctive design which the plaintiff had established the right to use in his business. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 219.

In such a suit it was held that it was immaterial that an immediate purchaser from the defendant was not deceived as to the identity of the goods, and that

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the plaintiff need not show that specific buyers from such purchaser were deceived or that the defendant intended to deceive the public. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 219.

In such a suit it also was held that the defendant might be liable not only for the damage suffered by the plaintiff but also to account to the plaintiff for any profits which might have accrued to the defendant from his use of the imitation. *Ibid.*

UNLAWFUL ENTICEMENT.

A declaration, in an action by one woman against another, which alleges that the defendant unlawfully gained the affections of the plaintiff's husband and enticed him to leave her home and to continue absent from it, "whereby the plaintiff lost the comfort, society, aid, assistance and support of her said husband and his affection for the plaintiff was wholly alienated and destroyed," states a cause of action for loss of consortium. *Webber* v. *Benbow*, 366.

Evidence to show adultery of the defendant with the plaintiff's husband was held to be admissible at the trial of such case. *Ibid.*

Indictment for enticing away a girl for the purpose of sexual intercourse, see *Commonwealth* v. *Rosenthal*, 50.

UNLAWFUL INTERFERENCE.

In a suit in equity against the officers and members of an unincorporated labor union for unlawfully causing the discharge of the plaintiff by means of an unlawful strike which compelled the plaintiff's superior to leave the question, whether he should discharge the plaintiff, to a vote of the workmen, a majority of whom voted for his discharge, the plaintiff is entitled to relief against the defendants who instituted and maintained the strike and not merely against those workmen who voted for his discharge. *Hanson* v. *Innis*, 301.

In such suit the plaintiff was held to be entitled to recover damages not only for the loss of wages due to his discharge but also, once for all, for his present and prospective inability to procure employment, which might continue for an indefinite time, caused by the unlawful acts of the defendants. *Ibid.*

VERDICT.

See that subtitle under PRACTICE, CIVIL.

VETERAN.

Constitutionality of a statute providing for the payment of gratuities to veteran soldiers and sailors still living, who volunteered in the Civil War and served in the army and navy to the credit of the Commonwealth and were honorably discharged and received no bounty, such gratuity being given as a testimonial of meritorious service for the purpose of promoting the spirit of loyalty and patriotism and not as a bounty or in equalization of bounties. *Opinion of the Justices*, 608.

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VOLUNTARY ASSOCIATION.

When the members of a voluntary association, which is a subordinate circle subject to the jurisdiction of a grand circle of a fraternal beneficiary order, have a beneficial interest in property and funds of such subordinate circle, they cannot be expelled or suspended from membership by the officers of the grand circle for non-payment of dues or taxes to the grand circle, under a by-law authorizing such expulsion or suspension for such cause, without reasonable previous notice of the charges against them and an opportunity to appear and be heard upon the subject, although the by-laws contain no provision requiring the giving of such notice. *Curran* v. *O'Meara*, 261.

WAIVER.

Borrower, who, without insisting upon his rights under R. L. c. 102, § 51, had settled a usurious loan of less than $500 by giving the lender a new note, was held not to be able to benefit by the provisions of the statute as to the new note. *Shawmut Commercial Paper Co.* v. *Brigham*, 72.

Action for alleged breaches by the contractor of a building contract containing provisions that the defendant should perform the work to the satisfaction of the plaintiff's architect and that payments were to be made upon the architect's certificates, at the trial of which the jury in answer to special questions found a breach of the contract by the defendant resulting in damages to the plaintiff and the judge erroneously ordered a verdict for the plaintiff without submitting to the jury evidence tending to show that, through approval of the work by the architect, the plaintiff had waived the breach. *Erickson* v. *George B. H. Macomber Co.* 311.

Action of directors of a fraternal beneficiary corporation suspending a member under a valid by-law was held not to have been waived by similar action by them after the member received injuries which, if he had been a member in good standing, would have entitled him to benefits. *Solari* v. *Italian Society of Columbus*, 382.

Evidence at the trial of an action against the indorser of a promissory note, given by a corporation of which the defendant's son was the treasurer and indorsed also by such son, was held to tend to show that the defendant's son, in negotiating for a renewal of the note and promising to bring a new note, was acting not only for himself but also as the authorized agent of the defendant, so that the question, whether the defendant had waived demand and notice at or before the maturity of the note, was for the jury. *Sweetser* v. *Jordan*, 393.

WATER RIGHTS.

Affirmation of the rule as to the taxation of land in this Commonwealth adjoining the boundary line of Rhode Island, through which flowed a river with a fall in both States furnishing a valuable water power applied in a power house erected in Rhode Island, that the value of the property should be determined in reference to any and all uses to which it was adapted, including the power to be used on the petitioner's wheels in Rhode Island. *Blackstone Manuf. Co.* v. *Blackstone*, 14.

In determining such valuation for the purposes of taxation, it cannot be said

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as a matter of law that it is improper to use as a determining factor the relative fall of water in each State. *Blackstone Manuf. Co.* v. *Blackstone*, 14.

And the law of Rhode Island as to mills and mill privileges is not material in determining such valuation. *Ibid.*

WATER SUPPLY.

Under the provisions of St. 1904, c. 457, § 1, that the town of Revere might supply with water itself and its inhabitants and such inhabitants of the town of Saugus as then were supplied or might thereafter "make application to be supplied with water under the provisions of" St. 1889, c. 382, § 7, and that it might "regulate the use of such water and fix and collect rates to be paid for the use of the same," the town of Revere was given full and unqualified power to fix the rates to be paid for water furnished to inhabitants of Saugus. *Merrill* v. *Revere*, 468.

WAY.

Private.

The acquisition by an adverse user extending from 1868 to 1908 of a right of way running longitudinally over and along a portion of land comprised in a location granted to a railroad corporation by county commissioners in 1845 is not prevented by St. 1861, c. 100, which has remained in force and now is contained in St. 1906, c. 463, Part II, § 80. *Hall* v. *Boston & Maine Railroad*, 174.

A provision in a deed of land for a right of way for the benefit of "the owners and their assigns" of an adjoining lot of land of the grantor, if the right of way is over a pathway referred to in the deed as an existing way, may operate as an exception and create an easement in fee without the use of the word "heirs." *Foster* v. *Smith*, 497.

Where the owner of certain lots of land together with the fee in half of a town way adjoining one of them conveyed them by a deed reserving to himself, his heirs and assigns, all right to the town road in case of its discontinuance and "allowing" the grantee "to pass and repass to and from his land," the successors in title of such grantee were held, after a discontinuance of the town way, to retain a right of passing and repassing appurtenant to the land so conveyed. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

Public.

Creation by prescription.

If the edge of a sidewalk of a public way of a town, which extends one inch beyond the limits of the way, has been wrought and maintained by the town and used by the public as a portion of the travelled part of the way for more than twenty years, the town is bound to keep it in repair. *Barron* v. *Watertown*, 46.

A use of a way by the general public by permission of one, who in a deed of land had reserved a right of way for himself and his successors in title and those having business with him and them, is not such adverse use by the

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Way (*continued*).

general public as is necessary for the creation of a public way by prescription. *Jones* v. *New York, New Haven, & Hartford Railroad*, 521.

Creation of a public way by prescription which was prevented because the owner of the dominant estate maintained gates and bars across the way. *Ibid.*

Where at a trial there was evidence that the law of Connecticut required for the establishment of a public way by prescription fifteen years' uninterrupted use, but there was no further evidence of the law of Connecticut as to the nature of such use, it must be presumed that the common law of Connecticut is the same as that of this Commonwealth in requiring that the use should be adverse as well as continuous. *Ibid.*

Layout.

In certiorari proceedings against the mayor and the legislative bodies of a city to quash proceedings regarding the laying out of a way, it was held that an order of the legislative bodies laying out the way was not a matter "not admitting of delay" which, under R. L. c. 26, §§ 29, 30, the acting mayor would have had power to approve. *Dimick* v. *Barry*, 165.

In such proceedings it also was held that an error of the city authorities in accepting the approval of the acting mayor of such an order and in entering upon land for the purpose of constructing the way without procuring the approval of the mayor was substantial and not technical, and that there was no unconscionable delay by the petitioner, and therefore that the writ should issue. *Ibid.*

Effect of discontinuance.

Where the owner of certain lots of land together with the fee in half of a town way adjoining one of them conveyed them by a deed reserving to himself, his heirs and assigns all right to the town road in case of its discontinuance and "allowing" the grantee "to pass and repass to and from his land," the successors in title of such parties were held, after a discontinuance of the town way, to retain a right of passing and repassing appurtenant to the land so conveyed. *Battelle* v. *New York, New Haven, & Hartford Railroad*, 442.

Defect.

If the inside edge of a concrete sidewalk of a public way of a town is about three inches higher than the surface of the adjoining private land and is ragged, rough and broken off, and this condition has been known for a long time to the officers of the town, a traveller who falls and is injured by stepping on such edge may recover against the town under R. L. c. 51, § 18. *Barron* v. *Watertown*, 46.

In an action against a town under R. L. c. 51, § 18, for personal injuries caused by a defect in a public way the amount of a reasonable bill for medical services required as a direct result of injury may be recovered. *Ibid.*

Action against a street railway company by one who, while a traveller upon a highway in a city on which the defendant maintained tracks and ran its cars, was injured by falling into an insufficiently guarded trench which had been made by a contractor under a permit from the city and which the plaintiff alleged that the defendant had assumed the duty of guarding,

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where it was held that the question of the defendant's liability was for the jury. *Cleveland* v. *Boston Elevated Railway*, 75.

A railroad corporation, which under R. L. c. 111, § 129, is bound to keep in repair the portion of a public way crossed by its road at grade, was held under the circumstances not to be liable under the highway act for injuries to a boy caused by his foot catching between one of the rails of the track and the planking at such a crossing when he was running a race with his companions. *Harris* v. *Boston & Maine Railroad*, 573.

In an action by an administrator against a city under R. L. c. 51, § 17, for the loss of life of the plaintiff's intestate by reason of an alleged defect in a highway of the defendant consisting of a dangerous tree which fell upon the plaintiff's intestate as it was being taken down by the tree warden, it was held that the question, whether the tree had been a menace to travel for a sufficient length of time to constitute a reasonable notice to the defendant, was one of fact for the jury. *Donohue* v. *Newburyport*, 561.

A plaintiff in an action against a city under R. L. c. 51, § 18, for personal injuries caused by a defect in a highway is not entitled to have the jury instructed that in ascertaining damages they may add to what they consider to be a fair compensation to the plaintiff for the injuries he has suffered a further sum as interest due to him by reason of the delay caused by his having to resort to an action to enforce his claim. *Cochran* v. *Boston*, 171.

WILL.

Necessary parties to a compromise under R. L. c. 148, § 15; St. 1903, c. 222, of a controversy as to the allowance of a will. *Sherman* v. *Warren*, 288.

Finality of a certain decree as to such a compromise. *Bartlett* v. *Slater*, 334.

Construction of wills, see DEVISE AND LEGACY.

WITNESS.

Cross-examination.

The limiting of the cross-examination of a witness on collateral issues for the purpose of impeaching his credibility is within the discretion of the presiding judge, to the exercise of which no exception lies. *Maguire* v. *Pan-American Amusement Co.* 22.

Although some of the witnesses for the plaintiff at the trial of an action stated in cross-examination that their testimony in direct examination was not in accordance with the facts and also stated facts favoring the defendant, the presiding judge was held rightly to have refused to rule that the jury would not be warranted in finding the defendant liable upon such witnesses' testimony. *Jones* v. *Boston & Northern Street Railway*, 552.

Redirect Examination.

At the trial of an action for injuries caused by a collision of a street car with a motor cycle which the plaintiff was riding, it was held that under the circumstances the plaintiff properly was allowed to be asked in redirect examination, "Was there anything you could have done that you did not do to have avoided this collision?" *Robinson* v. *Springfield Street Railway*, 483.

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Impeachment.

The limiting of the cross-examination of a witness on collateral issues for the purpose of impeaching his credibility is within the discretion of the presiding judge, to the exercise of which no exception lies. *Maguire* v. *Pan-American Amusement Co.* 22.

Corroboration.

A witness who had testified for the Commonwealth at the trial of an indictment for murder and who in cross-examination had made statements tending to support a contention of the defense that he was testifying under the influence of a police officer, was allowed in redirect examination to relate conversations he had had with the members of his household tending to show that he was not testifying under such influence, and the members of his household were allowed to testify to the same conversations. *Commonwealth* v. *Marshall*, 86.

Child.

Discretion of the judge presiding at a trial of an indictment for murder was held not to have been exercised improperly in permitting a daughter of the defendant nine years and ten months of age to testify for the Commonwealth. *Commonwealth* v. *Marshall*, 86.

Previous Testimony.

Where in an action of contract the defendant is called by the plaintiff as a witness, he may be asked about his testimony at another trial, irrespective of the question whether such evidence is contradictory to his present testimony, if such previous testimony is an admission of a material fact. *Sweetser* v. *Jordan*, 393.

WORDS.

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"All this property." See *Spencer* v. *Adams*, 291, 295.
"Alteration." See *Commonwealth* v. *Hayden*, 296, 297.
"Beach." See *Castor* v. *Smith*, 473, 474.
"Between." See *Spencer* v. *Adams*, 291, 295.
"Business." See *Donohue* v. *Newburyport*, 561.
"Case." See *Commonwealth* v. *Marshall*, 86, 89.
"Children." See *Silsbee* v. *Silsbee*, 105, 109, 110.
"Construction." See *Commonwealth* v. *Hayden*, 296, 297.
"Corporation." See *Donohue* v. *Newburyport*, 561, 566, 568, 569.
"Issue." See *Silsbee* v. *Silsbee*, 105, 108, 109, 110.
"Major part." See *Old South Association* v. *Codman*, 211, 216, 218.
"Materials." See *Commonwealth* v. *Hayden*, 296, 297.
"Matters not admitting of delay." See *Dimick* v. *Barry*, 165, 166, 167.
"My surviving children." See *Spencer* v. *Adams*, 291, 294, 295.
"Occupancy." See *Hall* v. *Boston & Maine Railroad*, 174, 176.
"Of sufficient value." See *Lyman* v. *Commissioners on Fisheries & Game*, 10, 11, 12.

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"Premises." See *Old South Association* v. *Codman*, 211, 216, 218.
"Such officers or agents." See *Tower* v. *Miller*, 113, 114.
"Traveller." See *Harris* v. *Boston & Maine Railroad*, 573, 574.
"Use." See *Commonwealth* v. *Hayden*, 296, 297.
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